**DEPARTMENT OF JUSTICE**

**Immigration and Naturalization Service**

**8 CFR Part 3**

**[EOIR No. 131; AG Order No. 2609–2002]**

**RIN 1125–AA36**

## Board of Immigration Appeals: Procedural Reforms To Improve Case Management

**AGENCY:** Executive Office for Immigration Review, Immigration and Naturalization Service, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the structure and procedures of the Board of Immigration Appeals (Board), provides for an enhanced case management procedure, and expands the number of cases referred to a single Board member for disposition. These procedures are intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those cases presenting significant issues for resolution by a three-member panel. After a transition period to implement the new procedures in order to reduce the Board's backlog of pending cases, the size of the Board will be reduced to eleven.

**DATES:** This final rule is effective September 25, 2002.

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**SUPPLEMENTARY INFORMATION:**



## I. Introduction

The Attorney General has delegated to the Board of Immigration Appeals (Board) broad jurisdiction over appeals from decisions of the immigration judges in exclusion, deportation, and removal proceedings, bond appeals, asylum-only cases, and other specific matters, and also the authority to review certain final decisions by district directors and other officials of the Immigration and Naturalization Service (Service).[1] *See* 8 CFR part 3, subpart A. Decisions of the Board are subject to review by the Attorney General as provided in 8 CFR 3.1(h).

The Executive Office for Immigration Review (EOIR) was created by the Attorney General in 1983 to consolidate the adjudicatory process by placing the immigration judges and the Board in a single administrative unit separate and apart from the Service. 52 FR 2931 (Jan. 29, 1987). In 1987, the Attorney General also established the Office of the Chief Administrative Hearing Officer (OCAHO) within EOIR to adjudicate certain civil penalty issues. EOIR is an administrative component under the direction of the Attorney General, not a separate agency of the United States. It is, however, wholly separate from, and independent of, the Service.

### *A. The Problem Presented*

The Attorney General is promulgating this rule to improve the adjudicatory process for the Board because, under the current process, the Board has been unable to adjudicate immigration appeals in removal proceedings effectively and efficiently. In 1992, the Board received 12,823 cases and decided 11,720 cases, including appeals from the immigration judges or the Service, and motions to reopen proceedings. At the end of FY1992, the Board had 18,054 pending cases. By 1997, the number of new cases rose to 29,913, dispositions rose to 23,099, and the pending caseload had grown to 47,295 cases. Most recently, in FY2001, the Board received 27,505 cases and decided 31,789 cases. The pending caseload on September 30, 2001, totaled 57,597 cases.

To meet this demand, the number of Board members was increased from 5 positions to 12 positions in 1995, with further incremental increases in subsequent years to a total of 23 authorized Board member positions (with 19 members and four vacancies at

[1] In this **SUPPLEMENTARY INFORMATION**, the Department uses the term ''removal,'' and appropriate variations, to encompass all forms of proceedings before the Board. Similarly, the Department refers to all aliens in proceedings as ''respondents,'' whether they would be respondents or applicants. The use of these simplified terms is for the ease of the reader and should not be construed to imply any limitations on the scope of the final rule as it applies to matters within the jurisdiction of the Board.

present). It is now apparent that this substantial enlargement—more than quadrupling the size of the Board in less than seven years—has not succeeded in addressing the problem of effective and efficient administrative adjudication, and the Department declines to continue committing more resources to support the existing process. Rather, the Department believes that amendment of the adjudicatory process is a more effective approach to facilitate the ability of the Board to adjudicate the case backlog, as well as to provide meaningful guidance for immigration judges, the Service, attorneys and accredited representatives, and respondents.

Until recently, three-member panels reviewed all cases, even cases that presented no colorable basis for appeal. However, beginning in 1999, the Attorney General instituted a mechanism for streamlining cases. *See* 64 FR 56135 (Oct. 18, 1999). The streamlining process permits a single Board member to summarily affirm the immigration judge's decision without opinion; the Chairman is authorized to designate the type of cases that could be ''streamlined.''

The streamlining process undertaken by the Board has provided the best opportunity to manage the Board's backlog. Over 58% of all new cases in 2001 were sent to be summarily decided by single Board member review through streamlining. Testimony of Kevin Rooney, Director, EOIR, Hearing before the Committee on the Judiciary, Subcommittee on Immigration and Claims, United States House of Representatives, *Operations of the Executive Office for Immigration Review (EOIR)*, 107th Cong., 2nd Sess. 23 (Feb. 6, 2002) (hereinafter ''House Judiciary Subcommittee Hearing''). That initiative, allowing certain categories of appeals to be adjudicated by a single member, was recently assessed favorably by an external auditor. Arthur Andersen & Company, *Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report* (Dec. 13, 2001) (hereinafter ''Streamlining Study''). Streamlining was the first disengagement from a ''one size fits all'' philosophy of using three member panels for all cases. The final rule continues that process.

The Department agrees with the fundamental assessment that the Board's use of the streamlining process has been successful, and, in this rule, expands the single-member process to be the dominant method of adjudication for the large majority of cases before the Board. In particular, this rule removes the restriction that a single Board member is limited to affirming an immigration judge's decision ''without opinion'' in those cases where an affirmance is appropriate. While such dispositions are proper in a substantial number of cases, as the Board's experience to date with the streamlining process has demonstrated, there are many other cases that may require some explanation of the Board's rationale, for example, as to why the immigration judge's decision was the proper result, or why any asserted errors were harmless or immaterial.

Under the existing streamlining procedures, any case that is not appropriate for summary affirmance without opinion must be referred to a three-member panel for disposition, even if the issues are not novel or complex. That process can be, and has been, cumbersome and time-consuming, and expends an excessive amount of resources. Where single Board members can resolve such appeals through issuance of a brief written opinion, the Board will be able to concentrate greater resources on the more complex cases that are appropriate for review by a three-member panel, and will also be able to focus greater attention on the issuance of precedent decisions that provide guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.

Finally, under the Board's existing processes, decisions have all too often been issued long after the Notice of Appeal. Cases have routinely remained pending before the Board for more than two years, and some cases have taken more than five years to resolve. There is reason for concern that many appeals have been filed precisely to take advantage of this delay. Moreover, the quality of precedent decisions has not improved and the number of precedent decisions has remained relatively constant despite substantial changes in the law.

*B. History of the Rulemaking*

The Department published a proposed rule in the **Federal Register** on February 19, 2002, 67 FR 7309, proposing procedural reforms to improve case management at the Board. A 30-day public comment period ended on March 21, 2002.

In response to the proposed rulemaking, the Department received numerous comments from various nongovernmental organizations (NGOs), members of Congress, private attorneys, and other interested individuals. The Department received a total of 68 separate, timely submissions (with several NGOs submitting separate comments with attachments that were identical, and one set of NGO comments that attached lists of signatures totaling in excess of 900 individuals). Since many of the comments are similar and endorse the submissions of other commenters, the Department addresses the responses by topic rather than by referencing each specific commenter and comment. In addition, five comments were either postmarked and/or received by EOIR after the closing date for the comment period. None of the untimely submissions presented any comment that was not already addressed by an earlier commenter.

In addition, the Department has considered the record of the House Judiciary Subcommittee Hearing, *supra*, because that hearing dealt with the same subject as the rule and because of the perceptive discussion before the Subcommittee. The Department also considered the evaluation of the streamlining project in the Streamlining Study.

*C. 30-Day Notice and Comment Period*

Several commenters objected to the 30-day comment period for the proposed rule and requested an extension. Some of the NGOs also requested a meeting with the Department.

Notwithstanding the length of the comment period, 68 commenters submitted a variety of comments, many of which were thoughtful and extensive. The Department has reviewed and carefully considered all of the comments submitted and believes that the 30-day comment period has been sufficient. Additionally, the Department has decided against engaging in meetings with particular commenters since the written comments of all commenters as submitted are sufficient. The Department also notes that the Administrative Procedure Act (APA) provides that procedural rules may be issued without notice and opportunity for prior comment and may be effective upon publication. Rules which are arguably ''substantive'' require at least 30 days prior notice subject to certain exceptions. *See* 5 U.S.C. 553(b)(A), (d). Accordingly, the Department has fully complied with the APA, and no additional opportunity for comment is required or necessary considering the written comments already submitted. Furthermore, the 30-day comment period is in keeping with the Department's objectives, including eliminating unwarranted delay.

**II. Summary of the Revised Review System**

*A. Description of the Department's Goals*

At the time this rule was proposed, the Attorney General laid out four important objectives in the disposition of administrative immigration appeals: (1) Eliminating the current backlog of cases pending before the Board; (2) eliminating unwarranted delays in the adjudication of administrative appeals; (3) utilizing the resources of the Board more efficiently; and (4) allowing more resources to be allocated to the resolution of those cases that present difficult or controversial legal questions—cases that are most appropriate for searching appellate review and that may be appropriate for the issuance of precedent decisions. This rule reflects a variety of necessary reforms to achieve these various objectives, in order to strengthen the review process, enhance the function of the Board in resolving issues, provide effective guidance regarding the implementation of the immigration laws, and improve the timeliness of the Board's review.

The Board's decisions focus, for the most part, on the issue of whether a respondent has established eligibility for relief from removal from the United States and whether the Attorney General should affirmatively exercise discretion in the respondent's favor. Although the nature of the Board's caseload appears to be changing somewhat in light of changes in the law, the Board's caseload continues to focus heavily on relief from removal. Most respondents either concede removability before the immigration judge, or do not appeal the immigration judge's determination that the respondent is removable. Therefore, the dominant number of the Board's cases relate to the application of specific portions of the Act relating to relief from removal.

Moreover, the Department agrees with the assessment of former Board member Michael Heilman, based on his review of over 100,000 appeals over some 15 years of service on the Board, that the ''overwhelming percentage of immigration judge decisions * * * [are] legally and factually correct.'' House Judiciary Subcommittee Hearing, *supra*, at 15. The Department disagrees with a view that suggests that ''the factual records made in the majority of hearings * * * [are not] fully considered and assessed by either the Immigration Judge or the Board.'' *See Matter of A–S–*, 21 I&N Dec. 1106, 1122 (BIA 1998) (Rosenberg, dissenting). Accordingly, the final rule continues to focus on the primacy of immigration judges as factfinders and determiners of the cases before them. The role of the Board is to identify clear errors of fact or errors of law in decisions under review, to provide guidance and direction to the immigration judges, and to issue precedential interpretations as an appellate body, not to serve as a second-tier trier of fact.

In this adjudicatory process, the Department employs Board members to decide the merits of cases brought before the Board. That decisional process includes not only the individual case, but also the function of setting precedent to guide the immigration judges, the Service, attorneys and accredited representatives, and respondents. Historically, as the Attorney General's delegate, the Board's precedent decisions have been accorded appropriate deference under the Supreme Court's decisions in *Chevron* v. *NRDC*, 467 U.S. 837 (1984) (deference due agency interpretation of statutes within delegated authority); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (Attorney General, and hence the Board, accorded *Chevron* deference); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448–449 (1987) (same), as the primary interpreter of the Immigration and Nationality Act. The Attorney General's ultimate authority to decide the cases presented to the Board through his delegation has not changed over the years, although it has been exercised with varying frequency at different times of the Board's history.

This precedent setting function recognizes that novel issues arise each and every time that the Act, or the regulations, change; complex issues arise because of the interrelationship of multiple provisions of law; and repetitive issues arise before different immigration judges because of the national nature of the immigration process. All of the participants in the immigration adjudication process deserve concise and useful guidance on how these novel, complex, and repetitive issues are best resolved. The rule of law guides Board members' adjudications; the Act and regulations provide the context for that adjudication.

*B. Summary of the Provisions of the Rule*

The Attorney General has determined that the rights of all respondents are better protected by restructuring the appeals process so that three-member panels may focus their attention on writing quality precedent-setting decisions, correcting clear errors of fact and interpreting the law, and providing guidance regarding the standards for the exercise of discretion, rather than reviewing appeals that involve routine questions of law or fact or that present no substantial basis for reversing the decision under appeal. In this regard, the Board is delegated authority to review questions of fact to determine whether they are clearly erroneous; all other questions, whether of law or discretion, may be reviewed by the Board *de novo*. A key element of this reform is that the Chairman will establish, and be responsible for, a case management screening system to review all incoming appeals and to provide for prompt and appropriate disposition—by a three-member panel in those instances where the merits of the case presented to the Board call for review by a three-member panel under § 3.1(e)(6) of the rule, and by a single Board member in every other case that does not meet those standards.

The final rule establishes the primacy of the streamlining system for the majority of cases. These do not present novel or complex issues. A single Board member may issue a brief order where appropriate to affirm the decision of the immigration judge or dismiss the appeal on procedural grounds. A single Board member may issue a short order that explicates the reasons, for example, why an immigration judge's findings of fact are not clearly erroneous, or why the immigration judge's exercise of discretion was appropriate, or why the record should be remanded to the immigration judge for further proceedings.

Under specific circumstances, the single Board member may refer the record for decision by a three-member panel. These more complex cases deserve closer attention. The Board's *en banc* process remains as currently devised to provide interpretation of the Act through precedent decisions, whether through affirmation of a decision of a three-member panel or through review by the entire Board. Both the three-member panel and the *en banc* Board should be used to develop concise interpretive guidance on the meaning of the Act and regulations. Thus, the Department expects the Board to be able to provide more precedential guidance to the immigration judges, the Service, attorneys and accredited representatives, and respondents.

This process will resolve simple cases efficiently while reserving the Board's limited resources for more complex cases and the development of precedent to guide the immigration judges and the Service. The Department believes that this allocation of resources will better serve the respondents, the Service, the

public, and the administration of justice.

The final rule establishes the primacy of the immigration judges as factfinders by utilizing a clearly erroneous standard of review for all determinations of fact. The Board's historic rule, explained below, of not considering new evidence on appeal, is codified in this rule. Factfinding that may be required will be conducted by the immigration judge on remand.

However, the rule retains *de novo* review both for questions of law and for questions of judgment (concerning whether to favorably exercise discretion in light of the facts and the applicable standards governing the exercise of such discretion).

The rule contains a number of the time limits of the proposed rule. However, recognizing the concern of a number of commenters, the Department has decided to retain the current sequential briefing schedule for non-detained cases, but with shorter time limits. Under the final rule, detained cases will be briefed concurrently on a 21-day calendar and non-detained cases will be briefed consecutively on a 21-day calendar. Moreover, the Chairman is directed to undertake improvements in the transcription process to assist in the briefing process.

Finally, the rule retains the reduction to 11 Board members after a transition period. The Department is unpersuaded by the arguments received, particularly in light of the objective evidence, that the reduction to 11 Board members should be changed. The Board should, under this rule, be able to reduce its backlog and keep current, as well as conduct the *en banc* proceedings necessary to provide precedent guidance to the immigration community. Given the scope of these changes to the Board's structure and revisions to current procedures, the Department will continuously review the effectiveness of the rule in achieving the aforementioned Departmental goals.

## III. Comments on the Proposed Rule

The comments received on the proposed rule can generally be grouped into broad categories. In this analysis, we divide the comments and further discussion of the rule into specific subparts in order to provide a cohesive overview of the comments, the changes made in light of the comments, and the final rule. Many of the issues overlap and commenters treated the same issues in different ways. Accordingly, while all comments have been carefully reviewed, it may not be apparent from this discussion that a particular version of a comment has been directly addressed. To the extent practical, the Department has attempted to address the comments received as specifically as possible, but the duplication of comments, either by filing the same comment multiple times, or making minor adjustments in different submissions, makes it impossible to address each specific comment in a structured response.

The Department received widely divergent comments that both supported and opposed the proposed rule. The Department appreciates the contributions of all the individuals and groups who submitted comments. The Department has given careful consideration to all of the comments received on the proposed rule, as indicated in the following discussion. The thoughtfulness of the public comments has contributed greatly to improvement in the final rule. As discussed below, the comments also included ideas and specific proposals that were beyond the scope of the proposed rule.

Overall, most of the commenters supported at least some of the Department's objectives, especially the elimination of unwarranted delays and the current backlog of cases pending before the Board. As numerous commenters noted, languishing appeals do not serve the interests of justice. There are divergent views, though, regarding how these objectives should be accomplished. Some commenters generally supported the proposed rule, while many other commenters strongly opposed many or most of the specific provisions of the proposed rule.

### *A. General Due Process Issues*

Some commenters argued in a general way that the proposed rule violates due process or that it is otherwise bad procedure.

Initially, the Department notes that the due process clause of the Constitution does not confer a right to appeal, even in criminal prosecutions. *See Ross* v. *Moffitt,* 417 U.S. 600, 611 (1974) (''[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.''); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) (noting that ''a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all'') (citation omitted). Much as the Congress may dispense with the inferior federal courts by the same legislative stroke that created them, the Attorney General could dispense with the appellate review process in immigration proceedings, *i.e.*, the Board of Immigration Appeals.

Some of the commenters argued specifically that the proposed rule violates a respondent's right to due process under the Supreme Court's balancing in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The Department agrees that some form of hearing is appropriate and beneficial under the circumstances. *See Wolff* v. *McDonnell*, 418 U.S. 539, 557–58 (1974). However, due process is not ''a technical conception with a fixed content unrelated to time, place and circumstances,'' *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961), but is ''flexible and calls for such procedural protections as the particular situation demands.'' *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

Assuming that *Mathews* is the appropriate touchstone, the process that is due is determined by balancing the nature of the individual's interest, the fairness and reliability of the procedures, and the nature of the governmental interest. Many of the commenters focused on the nature of the interest of the individual, particularly in asylum and related cases where the respondents assert that the respondent will be persecuted, his or her life or freedom will be threatened, or that he or she will be tortured, if returned to his or her country of origin.

#### 1. The Respondent's Interest in the Individual Proceeding

First, and foremost, the vast majority of issues presented on appeal to the Board involve applications for relief from removal, not removal itself. Accordingly, the process that is due is not a process related to the government's efforts to remove the respondent from the United States. The process that is due is process relating to the respondent's request for amelioration of removal.

Those cases where the respondent has a basis to contest a finding of removability would appear to be more amenable to review by a three-member panel under § 3.1(e)(6). Removability, and whether the Service has established clear and convincing evidence to support the charge, when disputed, may be more likely to involve novel or complex factual or legal issues because of the multitude of governing statutory provisions, such as divisible State criminal laws. Whether a single-member or three-member review is more efficacious is a question best decided by the Board under the standards of this rule.

In most cases, the issues before the Board relate to whether the respondent

has established eligibility for an application for relief from removal, or whether the Attorney General should exercise discretion in the respondent's favor. In these cases, the Service has established the government's interest in removal of the respondent. The burden of proof in these cases shifts to the respondent to establish eligibility for relief from removal and, in most cases, that the respondent deserves a favorable exercise of the Attorney General's discretion. The process due under the Constitution in determining removability is substantially higher than the process required by the Constitution in determining whether to grant relief from such an order of removal.

2. The Government's Interest in the Immigration Adjudication Process

The interest of the government in effective and efficient adjudication of immigration matters, moreover, is substantially higher than an individual respondent's interest in his or her own proceeding. Congress is granted plenary authority under the Constitution in immigration matters and Congress has delegated broad authority to the Attorney General to administer the immigration laws. The authority is not merely one involving a discrete set of benefits and penalties, but implicates, in conjunction with the Secretary of State, the vast external realm of foreign relations. Not only does the removal process utilize reports and profiles of country conditions provided by the Department of State, the actual removal process implicates the relationships of the United States with other countries. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). In this context, the Attorney General has substantially more authority to structure the administrative adjudicatory process than most administrative processes. Indeed, the Department questions whether *Mathews* is the appropriate touchstone in light of the unique nature of the Act as the tool for managing the intersection of foreign and domestic interests regarding aliens. Congress has provided almost no parameters for the exercise of the Attorney General's broad authority to manage immigration adjudications, and to the extent it has done so, has limited discretionary procedure available to respondents. *See, e.g., INS* v. *Rios-Pineda*, 471 U.S. 444, 446 (1985) (Attorney General's creation of motion to reopen, and delegation to the Board, by regulation), 8 U.S.C. 1229(c)(6) (motions to reopen in statutory removal proceedings specified by statute in 1996). Accordingly, more deference to the Attorney General is appropriate. *Cf. Weiss* v. *United States*, 510 U.S. 163, 176–79 (1994).

3. Balancing of Interests in the Adjudicatory Process

Some commenters expressed concern that the expansion of the streamlining initiative, with its emphasis on single-member review of cases, will result in violations of the due process rights of respondents-appellants. Some commenters contended that three-member reviews of appeals provide more protection for due process rights than single-member reviews. The primary concern of the comments is a perceived inadequacy in the ability of a single Board member to decide an appeal in a way that protects the due process rights of appellants while maintaining administrative efficiency.

The Department finds that single-member review under the final rule is both fair and reliable as a means of resolving the vast majority of non-controversial cases, while reserving three-member review for the much smaller number of cases in which there is a substantial factual or legal basis for contesting removability or in which an application for relief presents complex issues of law or fact. In this context, the Attorney General is free to tailor the scope and procedures of administrative review of immigration matters as a matter of discretion. *Maka* v. *INS*, 904 F.2d 1351 (9th Cir. 1990); *see also Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524–25 (1978), *quoting FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940) (''administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' ''). *See generally* J. McKenna, L. Hooper & M. Clark, Federal Judicial Center, *Case Management Procedures in the Federal Courts of Appeals* (2000) (comparative compendium of innovations in circuit court case management systems).

Each case varies according to the needs presented by the respondent and the issues.[2] In the typical case that reaches the appeal stage, the respondent makes an initial appearance and is advised of his or her rights, including the right to be represented by counsel or an accredited representative at no cost to the government, the right to inspect all evidence presented, and the right to present evidence and testimony, by the respondent and other witnesses, in the language the respondent understands. Pleadings are usually taken after a continuance, with a further hearing being held to determine whether the alien is deportable or inadmissible, if the respondent contests removability. If the immigration judge finds that the respondent is removable, the immigration judge informs the respondent of possible forms of relief, and further continuances may be granted to allow time for the respondent to prepare applications for relief and acquire additional evidence. A call-up date is established for filing the application and a deadline is set for filing additional evidence. Only then is the respondent expected to present his case for relief from removal. All of these proceedings are on the record and recorded verbatim. A transcript of proceedings has been prepared in all appeals, including any oral decision by the immigration judge. *See, e.g.*, 8 CFR 240.3–240.13 (procedure in removal cases). Accordingly, by the time a case reaches the Board on appeal, many, if not most, respondents have already had several hearings on the record before the immigration judge, been explained their rights, and been given more than one opportunity to ask questions and raise issues.

On appeal, the respondent is required under existing regulations to file a statement indicating the grounds for appeal, and has the right to file a more detailed brief. On this record, single Board members are well-equipped both to determine the legal quality and sufficiency of an immigration judge's decision and to determine if the appeal qualifies under 8 CFR 3.1(e)(6) for referral to a three-member panel. Each appeal will be fully reviewed and decided by the Board member within the law and regulations, precedent decisions, and federal court decisions. The Department is not persuaded that a single Board member review gives any less due process to an respondent's appeal that involves routine legal and factual bases than would a three-member panel considering the same appeal.

*B. General Comments Relating to the Role and Independence of the Board*

Some commenters argued that the provisions of this rule, either individually or in combination, would adversely affect the fairness or effectiveness of the Board's adjudications by limiting the independence and perceived impartiality of the Board. Some commenters criticized the provision in § 3.1(a)(1) of the proposed rule that the

[2] In recognition of the differences between appeals from the decision of an immigration judge and appeals from decisions by a district director or other Service official, this rule retains the *de novo* standard of review for appeals in the latter case, as discussed below.

Board members act as the ''delegates'' of the Attorney General in adjudicating appeals, as well as the language in § 3.1(d)(1) of the proposed rule making clear that, in exercising their independent judgment and discretion in cases coming before them, the Board members are subject to the Act and the implementing regulations, and the direction of the Attorney General.

1. The Attorney General's Authority

These arguments misapprehend the nature of the Board and the rule. The Board is an administrative body within the Department, and it is well within the Attorney General's discretion to develop the management and procedural reforms provided in this rule.[3] As one court has noted, the Attorney General could dispense with Board review entirely and delegate his power to the immigration judges, or could give the Board discretion to choose which cases to review. *See Guentchev* v. *INS,* 77 F.3d 1036, 1037 (7th Cir. 1996).

In *Nash* v. *Bowen,* 869 F.2d 675 (2nd Cir. 1989), the court of appeals addressed similar concerns by an administrative law judge (ALJ) challenging efforts by the Social Security Administration (SSA) to improve the ALJ's quality and efficiency. In an effort to reduce a backlog of 100,000 cases, the SSA instituted a series of reforms that included a monthly production quota, an appellate system or peer review program, and a reversal rate policy. The court rejected challenges to each of these reforms, explaining that ''those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decision making process.'' *Id.* at 681 (citations omitted). Similarly, the Attorney General has promulgated a final rule within his discretion intended to reduce delays in the review process, enable the Board to keep up with its caseload and reduce the existing backlog of cases, and allow the Board to focus more attention on those cases presenting significant issues for resolution by a three-member panel. The Department, in this final rule, does not go so far as did the SSA, nor does it intend to impinge on the intellectual independence of its adjudicators.

2. Independence of Administrative Adjudicators

Several commenters argued that the independence and impartiality of immigration judges and immigration adjudicators must be affirmed. They asserted that the proposed rule would adversely affect the independence of the Board. Some of these same commenters expressed the view that immigration courts should be independent from the Department.

These comments misapprehend the distinction between ''independence'' and ''fundamental fairness.'' The Constitution requires fundamental fairness, not that the adjudicator be ''independent'' of policy direction or management by the Executive. The Department agrees with the principle of independence of adjudicators within the individual adjudications, but notes that freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review. The case management process that is established and delegated by the Attorney General to the Director of EOIR and the Chairman deals with management of the workload, not professional judgment in adjudicating any individual case. Similarly, establishing standards for review by rule is well within the Attorney General's authority to oversee and manage the Board; again, it is not related to the Board's professional judgment in adjudicating any individual case. The key to understanding here is that the Department employs Board members to make professional adjudicatory judgments in individual cases and to establish precedent subject to further review, but it is within the Attorney General's authority to manage the caseload and to set policy.

The authority of the Attorney General to establish standards for the Board's adjudications, and to review the decisions of the Board, is well established. ''[T]he Board acts on the Attorney General's behalf rather than as an independent body. The relationship between the Board and the Attorney General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.'' *Matter of Hernandez-Casillas,* 20 I&N Dec. 262, 289 n.9 (BIA 1990, A.G. 1991).

The final rule does not obstruct the Board's judgment. As the Supreme Court has noted, ''The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations [that provided] that ''in considering and determining * * * appeals, the Board * * * shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board * * * shall be final except in those cases reviewed by the Attorney General.'' *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 266 (1954). In that case, the Court initially found sufficient cause for a further hearing on whether the Attorney General had interfered with the authority that he had delegated to the Board, and concluded: ''[A]s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.'' *Id.,* at 267. However, after a formal hearing on the petition for habeas corpus and further review by the court of appeals, the Court ultimately concluded that no such violation of the regulation, adversely affecting the respondent, had occurred. *Shaughnessy* v. *United States ex rel. Accardi,* 349 U.S. 280 (1955).

This case is important to understanding the final rule for two distinct reasons. First, the final rule amends the very rule under consideration by the Supreme Court in *Accardi* to structure the Board's procedures and scope of review in all cases. This is precisely the manner by which the law requires such changes to be made: amendment of the Board's regulations. Second, no portion of the final rule relates to any specific case or alien, or decides any such case, or implicates any alien. The actions here taken are those prescribed by the Court in *Accardi.*

3. Attorney General Opinions and Written Orders

Several commenters objected to the new language in § 3.1(d)(3)(i) of the proposed rule that the Board is subject to legal opinions and written orders issued by the Attorney General, in addition to the Attorney General's review of individual Board decisions. The Department notes that the proposed rule, in this respect, is virtually identical to the proposed rule published by former Attorney General Janet Reno, and retains this provision without change. 65 FR 81435, 81437 (Dec. 26, 2000).

The Attorney General is the principal legal advisor to the President and the Executive Branch. In particular, section 103(a) of the Immigration and Nationality Act (''Act''), 8 U.S.C.

[3] The Board was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. Reorg. Plan V (May 22, 1940); 3 CFR Comp. 1940, Supp. tit.3, 336. The Board is not a statutory body; it was created wholly by the Attorney General from the functions transferred. A.G. Order 3888, 5 FR 2454 (July 1, 1940); *see Matter of L-,* 1 I&N Dec. 1 (BIA; A.G. 1940).

1103(a), provides that the opinion of the Attorney General on legal issues is controlling. In addition, the role of the Department's Office of Legal Counsel in issuing legal opinions, on behalf of the Attorney General, that are binding on the Executive Branch, is well established. *See e.g., Secretary of the Interior* v. *California,* 464 U.S. 312, 320–21 n.6 (1984); *Sea-Land Service, Inc.* v. *Department of Transportation,* 137 F.3d 640, 643 (D.C. Cir. 1998).

This rule makes clear that the Attorney General need not be strictly limited to the issuance of legal opinions and the direct review of individual Board opinions, and that the Attorney General may provide direction to the Board through written orders.[4] It may be appropriate for the Board to take account of the policy goals or priorities established by the Attorney General. Such actions by the Attorney General do not encroach on the decisional independence of Board members in particular cases before them.

4. The Effect of Regulations

Although not specifically raised in the public comments, the Department also notes that the language of § 3.1(d)(1) of the proposed rule states that the Board will resolve the issues before it in a manner that is ''consistent with the Act and the regulations.'' This language clarifies the role of regulations in administrative adjudications under the Act.

The Board has long recognized that it is bound by the provisions of the Act, as well as by regulations adopted by the Attorney General. *See Matter of Ponce de Leon-Ruiz,* 21 I&N Dec. 154, 158 (BIA 1996) (''The Board is bound to uphold agency regulations * * * A regulation promulgated by the Attorney General has the force and effect of law as to this Board and Immigration Judges. Regulations in effect have the force and effect of law.'') (citations omitted).

The immigration regulations, however, include not only those rules adopted personally by the Attorney General, but also substantive and procedural rules duly promulgated by the Commissioner of the Service, under an express delegation of rulemaking authority from Congress to the Attorney General and, in turn, from the Attorney General to the Commissioner. *See* 8 U.S.C. 1103; 8 CFR 2.1. The Department fully recognizes and reiterates, of course, that the Board and the immigration judges are independent of the Service (although some court opinions contain language that appears to blur this key distinction). For this reason, the Attorney General, and not the Commissioner, has consistently promulgated the regulations that govern the organization, procedures, or powers of the Board and the immigration judges and the conduct of immigration proceedings. *See, e.g.*, 8 CFR parts 3, 236, 240. Thus, for example, standards governing the availability of discretionary relief in immigration proceedings are properly adopted by the Attorney General, either by rule, *e.g.*, 8 CFR 240.58, or by written decision, *e.g.*, *Matter of Jean,* 23 I&N Dec. 373, 383–85 (A.G. 2002). *See generally, Lopez* v. *Davis,* 531 U.S. 230, 238–42 (2001).

The authority delegated to the Commissioner to promulgate substantive or ''legislative'' rules does properly extend, however, to the interpretation of the general provisions of the Act. A regulation adopted pursuant to delegated statutory authority and pursuant to applicable rulemaking requirements under the Administrative Procedure Act has the ''force and effect of law'' as a substantive or legislative rule. The existing language in section 3.1(d)(1), which defines the broad general powers of the Board, specifies that the Board's authority in cases before it is ''[s]ubject to any specific limitation prescribed by this chapter [constituting 8 CFR parts 1–499].'' Necessarily, such limitations would include a regulatory provision that has given a specific legal interpretation to a provision of the Act. The language of this rule makes explicit what was implicit in the current version of § 3.1.

A fundamental premise of the immigration enforcement process must be that the substantive regulations codified in title 8 of the Code of Federal Regulations are binding in all administrative settings, and this specifically includes substantive regulations interpreting and applying the provisions of the Act. Of course, the Service and the Board are bound by the decisions of the federal courts, *see, e.g., Matter of Anselmo,* 20 I&N Dec. 25 (BIA 1989), but even the federal courts owe deference to authoritative agency interpretations of the substantive provisions of the Act, within the limits recognized by the Supreme Court. *Chevron* v. *NRDC, supra* (deference due agency's interpretation of statutes delegated for administration); *INS* v. *Aguirre-Aguirre, supra* (deference due administrative interpretations of the Act); *cf., Fisher* v. *INS,* 79 F.3d 955, 961 (9th Cir. 1996) (*en banc*) (same; different standard). In the absence of such controlling judicial interpretations, the respondents, the immigration judges, the Service, and the public at large should not be left to wonder whether the regulations interpreting and applying the substantive provisions of the Act will be binding in administrative proceedings under the Act. *Cf. Matter of Rodriguez-Tejedor,* 23 I&N Dec. 153, 156 (BIA 2001).

Such regulations themselves, of course, are susceptible to interpretation and application of their regulatory language by the immigration judges and the Board. However, if a substantive rule clearly defines a statutory term, or reflects a legal interpretation of the statutory provisions, then the position set forth in the rule will govern both the actions of the Service and the adjudication of immigration proceedings before the immigration judges and the Board. The Department recognizes that the Board members, under § 3.1(a)(1) in the current regulations and under § 3.1(d)(1)(ii) as revised, ''shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board.'' But such judgment and discretion must necessarily be exercised subject to the applicable standards. In turn, legislative rules that interpret and apply the provisions of the Act, and that are promulgated under rulemaking authority expressly delegated by the Attorney General have the ''force and effect of law'' and accordingly are part of the governing law. Accordingly, the Board members properly have decisional independence and discretion in interpreting and applying the law to the facts of particular cases and in exercising judgment in matters of discretionary action, but they are not independent from the governing regulatory standards that are otherwise binding and effective.[5]

[4] The Board has expressly acknowledged, for example, that the Attorney General's determination of a legal issue in interpreting the Act is binding on the Board and the immigration judges, even if that determination is reflected in the **SUPPLEMENTARY INFORMATION** to a rule rather than in the text of a rule or in an Attorney General or OLC Opinion. *See Matter of A–A–,* 20 I&N Dec. 492, 502 (BIA 1992): 'In the supplementary information published with the regulation, the Attorney General made clear that ''under the prevailing intrepretation, the phrase ''shall apply to admissions'' as used in section 511(b) of the [1990 Act] refers to all applications for relief pursuant to section 212(c) of the Act submitted after November 29, 1990, whether at a port of entry or in subsequent proceedings before a district director or Immigration Judge.'' 56 FR 50,033–34 (1991) (**SUPPLEMENTARY INFORMATION**). The Attorney General has thereby determined that the statutory bar to section 212(c) relief shall apply only to those applications submitted after November 29, 1990. We are therefore bound by his determination in this regard.''

[5] In any case where the Board believes that a particular regulation may conflict with the language of the Act, the Board can proceed as it did in *Matter*

*C. Expanded Single-Member Review*

Many of the key features of the final rule are codified in the new provisions of 8 CFR 3.1(e), which directs the Chairman to establish a case management system with specific new standards for the efficient and expeditious resolution of all appeals coming before the Board. One of the primary components of the case management system is expanded single-member review. The current streamlining process permits a single Board member to affirm the decision of the immigration judge without opinion. 8 CFR 3.1(a)(7). The final rule retains this current practice intact, but expands upon this authority to permit a single Board member to affirm, modify, or remand the immigration judge's decision with a short explanation. The final rule also provides that the reviewing Board member may refer a case for disposition by a three-member panel only if the Board member determines, after a review of the case on the merits, that it satisfies one of the standards prescribed in § 3.1(e)(6).

1. General Comments on the Adequacy of Single-Member Review

Many of the comments expressed the concern that single-member review of decisions by the immigration judges will mean that procedural failures in the record will be overlooked—that a single Board member's review will somehow be ''cursory'' or will give a ''boilerplate stamp of approval'' to the decision on appeal. Some commenters asserted that the single-member decisions that will be issued under this rule will be poorly considered and will not provide a sufficient basis for further review by district and circuit courts.

The Department believes that the Board's experience with the streamlining initiative has proven that fears of procedural failures or substantive errors being overlooked are not well founded. Even single-member review is a multi-stage process involving review by Board staff and by a Board member assigned to the screening panel. Individual Board members are well-equipped to determine both the legal quality and sufficiency of an immigration judge's decision, and to determine if the appeal qualifies for referral to a three-member panel under § 3.1(e)(6). Each appeal will be fully reviewed and decided by the Board member, within the guidelines of current Board practice and legal precedent. Under the standards of § 3.1(e)(4) and (5) of this rule, it is only if the Board member finds that the record is complete and legally adequate, and the Board member agrees that the decision below is legally correct, that the Board member may affirm the decision of the immigration judge, either as a summary affirmance without opinion or in a short opinion.

2. Summary Dismissals

The proposed rule included a provision that the screening panel, in those cases not summarily dismissed, would order the preparation of a transcript and set a briefing schedule. This provision presumed a review by the screening panel at the outset of the process based solely on the immigration judge's order and the Notice of Appeal to determine such fundamental matters as whether the appeal was timely filed, whether the Board had jurisdiction, or whether the Notice of Appeal facially provided sufficient reasons for an appeal to be lodged. Some commenters did not seem to grasp the distinction between these core ''adjudicability'' issues that could be dismissed without the preparation of the transcript and briefs, and those issues, such as whether a brief was filed, that inevitably must be decided only upon the completed record. Although this lack of understanding appears to the Department to require this further explanation, it does not appear to warrant any change in the rule.

3. Summary Affirmances Under Streamlining

Many commenters expressed concerns about the general idea of authorizing a single Board member to issue a summary affirmance of an immigration judge's decision. A few commenters argued that decisions affirming an immigration judge's decision without further elaboration would not be considered by the public to be as legitimate as a more fully developed written decision. Other commenters suggested that such an affirmance would hinder a respondent's understanding of the rationale behind the decision. Some commenters also suggested that courts of appeals will return many of the single-member and summary affirmance decisions for a fuller written decision, thus negating any advances made in diminishing the Board's backlog and arriving at decisions more quickly.

These concerns fail to consider the Board's experience under the existing streamlining process, which, since 1999, has authorized single Board members to summarily affirm a decision without opinion, in appropriate cases. Similar objections were raised regarding summary affirmance when the Department first proposed the ''streamlining'' initiative in 1998, *see* 64 FR 56135, 56137 (Oct. 18, 1999), but have not been borne out by the Board's experience since then.

The streamlining initiative allowed for summary decisions by a single Board member in certain limited situations. In FY2001, the Board issued 15,372 decisions under the streamlining initiative, or approximately one-half of all decisions. The Streamlining Study has not noted an appreciable difference in the quality of the decisionmaking based on the experience of the participants. Although a complex study of the results of streamlining, by following a specific set of streamlined cases through judicial review, has been proposed, such a theoretically ''objective'' evaluation could take years. The Department may or may not undertake such a study, but the demands for fair, effective, and efficient adjudication of present cases do not permit the luxury of waiting for the results of such a study. Streamlining Study, 10–11 and Appendix C. Summary affirmances have not yet resulted in an overwhelming number of remands from Federal district and appeals courts. *See* 64 FR at 56138 (Oct. 18, 1999). Of the 23,224 streamlined decisions between 1999 and 2001, only 0.7% have resulted in judicial remands or reversals. Although this is not the full study envisioned by the Streamlining Report, cited above, it is, together with anecdotal evidence, sufficient evidence for the Department to proceed with an expansion of the single-member review process. The Department has concluded that streamlining has proven to be an effective procedure for managing an ever-increasing caseload and will significantly assist and promote fair and expeditious review of all pending and incoming appeals while maintaining a respondent's rights to a reasoned administrative decision.

Furthermore, the Department has determined that, because a summary affirmance without opinion concludes that any error in the immigration judge's decision was harmless or immaterial, there is no basis for the contention that a respondent will be unable to discern the rationale behind a decision. The immigration judge's order provides the rationale, and thus the legitimacy, for the Board's summary affirmance. The Department, in this rule, agrees with the succinct summary of one court of appeals that, ''if the Board's view is that

*of Ponce de Leon* by certifying the case to the Attorney General for consideration. In that case, the Attorney General ultimately dismissed the certification in light of an intervening amendment to the regulation at issue, 8 CFR 212.3(f)(2). *See Ponce de Leon,* 21 I&N Dec. at 184 (A.G. 1997); 61 FR 59824 (Nov. 25, 1996).

the [immigration judge] 'got it right,' the law does not demand that the Board go through the idle motions of dressing the [immigration judge's] findings in its own prose.'' *Chen* v. *INS,* 87 F.3d 5, 7 (1st Cir. 1996). The Department does not believe that there is any basis for believing that providing a regurgitation of the same facts and legal reasoning, albeit with citation to more legal precedent, will be beneficial to the respondent or the reviewing courts in most cases. Section 3.1(e)(4) of the final rule therefore continues to authorize a single Board member to issue an order with the same effect, an order affirming the immigration judge without opinion.

Moreover, Service appeals are equally subject to summary affirmance. Although the Service appeals few immigration judge decisions terminating proceedings or granting relief from removal, there is no distinction between those appeals and appeals filed by respondents.

4. Other Dispositions by a Single Board Member—Affirmances, Modifications, and Remands

Some commenters took the position that single Board members should not be permitted to affirm, modify, or remand the decision of an immigration judge in a short opinion. They argue that, if there are factual errors, a three-member panel should consider the entire record. This rule retains the existing ''summary affirmance without opinion'' process intact, but also authorizes single Board members to resolve other cases by issuance of a short order explaining the relevant issues in the case.

At the outset, it should be noted that the Board has been allowed to summarily affirm decisions of the immigration judge ''for the reasons stated therein'' for many years before the streamlining initiative was begun. The Board was never prohibited from doing so. In reality, some panels of the Board have done so in the past with great success.

However, there may be a number of instances where the reviewing Board member believes that the result of the case under review is essentially correct, but requires some further explanation or discussion in the disposition of the appeal. For example, an immigration judge may not have explained his or her evaluation of the facts or the law in the manner in which the respondent believes was appropriate. However, in those instances where there is no error that affects the outcome of the proceedings, there is also no point in expending substantial time and effort to ''correct'' such a record. Rather, a single Board member is authorized to issue a short order affirming the immigration judge's decision, but adding an additional explanation of discussion of the case in that Board member's view.[6]

As discussed below, § 3.1(e)(5) also authorizes a single Board member to enter a decision that modifies the immigration judge's decision or remands the case to the immigration judge in any case that does not meet the standards for three-member panel review under § 3.1(e)(6). Such an opinion may properly begin with the opinion of the immigration judge and make specific modifications to that opinion. For example, a single-member opinion may state that the Board member ''adopts the opinion of the immigration judge, except to note that'' a particular issue is governed by intervening precedent, and to explain that the immigration judge's opinion would still be correct in light of the intervening precedent. Accordingly, such an opinion would conclude that the ''immigration judge's opinion is affirmed for the reasons set forth therein and as set forth in this opinion.'' In this instance, the parties and any reviewing court would be able to look to the combination of the immigration judge's opinion and the single-member decision to understand the conclusions reached in the adjudication.

Similarly, the single-member review may result in a determination that the immigration judge clearly erred over a specific fact, but that the error did not prejudice the appealing party and was harmless. For example, an immigration judge might determine that the respondent had entered on a specific date based on conflicting evidence, but fail to note in the oral decision that a specific official government document indicated a slightly different date, such as a traffic violation in the United States some days prior to the date determined by the immigration judge. In this case, if neither date would satisfy a requirement for a period of continuous physical presence in the United States, the finding of fact might be both clearly erroneous and harmless. However, if the existence of the documented infraction, presented by the respondent, convinced the Board member that the respondent was being candid and warranted a favorable exercise of discretion in voluntary departure, which the immigration judge had also denied as a matter of discretion, the single Board member would have the option of modifying the order to grant voluntary departure.

Finally, a single Board member would be authorized to grant a motion to remand the record for specific factfinding if the respondent provided new evidence that was not previously available under the standards of the regulations. Whether agreed upon by all of the parties or contested, this single member review process permits the more expeditious disposition of cases than a full three-member panel review. In each of these cases, the Department has no reason to believe that such decisions would be any less efficacious than the current decisions of the Board resulting from three-member panel review.

The Department has noted that some language in this section and § 3.1(d)(2)(ii) could cause confusion over the finality of a decision by a single member. Accordingly, the language in these two provisions has been revised for clarity, and the provisions relating to finality of the Board's decisions have been consolidated in § 3.1(d)(6), as discussed in part I below.

However, the provision authorizing a single Board member to affirm, modify, or remand a decision must be understood in light of the standards for three-member panel review. That is, this authority will apply only if the Board member has already determined, based on a review of the appeal on the merits, that the case should not be referred to

[6] Individual panels at the Board have differed on the content of Board decisions in non-precedent cases over time. Some panels have included an introduction, a statement of issues present in the record, a full restatement of the proceedings before the immigration judge, a complete recitation of the established and controverted facts presented in the record, analysis of the applicable law, and the panel's conclusions and order. This is, in effect, *de novo* review of every case, notwithstanding the complexity of the issues presented. For cases in which there are no substantial factual or legal issues, this commitment of resources cannot be justified in light of the Board's current situation.

Other panels, more recently, have developed orders that include an adoption of the immigration judge's decision, only a short statement of the issues presented on appeal, with a statement of relevant facts and controlling precedent, and the order. Typically, these decisions are to be read in conjunction with the immigration judge's decision. The Department believes that this more limited appellate review process, to determine whether the immigration judge has erred, is more appropriate for the majority of cases.

The different approaches can also be understood on the basis of the way in which the decisions are reviewed. In the first example, a full *de novo* review results in a court of appeals review of the Board decision and does not extend to the immigration judge's decision. In the second example, a ''clearly erroneous'' standards will allow the courts of appeals to review the immigration judge's fact findings in conjunction with the Board's legal findings, thereby obviating the need for lengthy Board decisions that do little more than reiterate facts. The short orders of the Board already effectively utilize this methodology. This process adds nothing to the burden of the court of appeals on review and is a substantially more efficient allocation of resources within the administrative adjudicatory process.

a three-member panel—for example, because of factual determinations by the immigration judge that appear to be clearly erroneous, because the decision is not in conformity with applicable precedents, or because of the need to review the dispositions of similar issues by various immigration judges or to establish precedential guidance on matters of law or procedure.

5. Reversals and Terminations of Proceedings

Several commenters raised issues regarding the propriety of a summary decision by a single Board member that reverses the decision of the immigration judge, with some suggesting that a single Board member should not be able to reverse a decision granting relief or terminating proceedings, while others suggested that a single Board member should not be able to reverse a decision denying relief.

In general, if the single Board member believes that the decision of an immigration judge should be reversed because of a clearly erroneous factual determination or an error in law, or one of the other reasons specified in § 3.1(e)(6), the Board member should refer the case to a three-member panel. Under the terms of the proposed rule, it is reasonable to expect that most reversals would likely have been handled by a three-member panel rather than by single Board members. However, in order to avoid uncertainties as to how to proceed, this final rule adds an additional provision under the standards of § 3.1(e)(6) providing for referral of a case to a three-member panel where there is a need to reverse the decision of an immigration judge or the Service.

However, the Department also recognizes that there may be cases where reversals may be required as a nondiscretionary matter. This would be particularly true where there has been an intervening change in the law, such as the publication of a Board precedent decision interpreting a statutory provision relating to eligibility or ineligibility for a form of relief, that mandates the reversal of immigration judge decisions in pending cases that were inconsistent. If the Board determines that relief should be granted in particular circumstances, and an immigration judge had denied relief in a case where the facts are indistinguishable, there is no reason why a single Board member cannot summarily vacate the immigration judge's order denying relief. On the other hand, if the factual record does not compel reversal under the precedent as applied to that case, the single Board member may then refer the case to a three-member panel or remand the record for further proceedings. This is typical of the implementation of precedent.

6. Quality Assurance of Decisions

Other commenters questioned whether the Board would be able to assure that single Board members did not act arbitrarily or institute a mechanical, rather than thoughtful, approach to disposing of cases themselves or forwarding cases to three-member panels. In essence, these comments focus on both the individual thoroughness of review and the integrity of the review process among decisionmakers.

The Department has carefully considered the argument that there are inadequate safeguards to protect the system and its participants from divergent decisions by single Board members, but has concluded that the provisions of this rule as written are adequate. As mentioned previously, concerns regarding the adequacy of summary affirmances were addressed in the streamlining regulations. This rule builds upon the streamlining process by providing for a case management screening process to review all cases coming before the Board initially, thus allowing the members of the screening panel to become familiar with the broad range of issues coming before the Board, and the processes for both single-member and panel dispositions of cases decided by the Board. The existing checks of three-member review of complex issues and other cases under the standards of § 3.1(d)(6), and of *en banc* Board review, remain in effect. Accordingly, the Department believes that a shift to predominantly single-member adjudication in the substantial majority of cases is a legitimate exercise of agency discretion and will not significantly increase judicial remands.

However, the Department recognizes that any tribunal must be concerned with whether its members are adjudicating factually and legally similar claims in a similar fashion, a concern that is particularly apt given the large volume of cases being decided by the Board. *See generally* House Judiciary Subcommittee Hearing, at 10. These general concerns relating to this aspect of the Board's operation are important to the Department, to the immigration judges, to aliens in proceedings, and to the general public. These concerns are relevant whether applied to several different individual members' decisions in single-member cases, or to the results of the various three-member panel reviews that have been used in the past and will continue to be used in the future.

The Board recently has taken further steps to review the disposition of Board decisions in light of the need to resolve issues and provide guidance through the issuance of precedent decisions. Exercising its authority under the existing rules and the revisions made by this rule, the Department expects the Board will be able to determine whether issues are developing appropriately and whether referral of similar cases to a three-member panel, or further adjudication of those issues by issuance of a precedent decision, may be appropriate. *See generally* J. McKenna, L. Hooper & M. Clark, Federal Judicial Center, *Case Management Procedures in the Federal Courts of Appeals* 163 (2000) (case weighting and issue tracking in the Ninth Circuit); *see generally* B. White, *et al.*, *Commission on Structural Alternatives for the Federal Courts of Appeals: Final Report,* at 39–40 (1998).

7. Single Board Member Participation in Reopening and Reconsideration of Own Decision

One commenter suggested that a single Board member who made an initial decision should be recused from adjudication of the motion to reopen or reconsider. The Department disagrees that the single Board member who made the initial decision should be recused from adjudicating these types of motions. The long-standing practice of the Board has been to assign motions to reopen and reconsider to the original Board Members who considered the appeal if they are available. This permits some familiarity with the record and obviates the use of such a motion to merely seek a second panel review of a decision. Moreover, as with the initial notice of appeal, a party filing a motion to reopen or to reconsider can state in the motion any reasons why the motion should be referred to a three-member panel for adjudication, as provided in § 3.1(e)(6).

*D. Standards for Referral of Cases to Three-Member Panels*

1. In General

Some commenters suggested a modification to the rule to specify additional types of cases that would be referred to a three-member panel. This rule retains the basic provisions of the proposed rule, which provide for an initial review of each case by a single Board member, and allows for referral of cases to a three-member panel based upon the specific criteria of 8 CFR 3.1(e)(6). This review process for

adjudicating the cases is both fair and efficient in meeting the Department's goals. However, as discussed below, the Department has made certain clarifications to these provisions based on the public comments.

As noted above, an agency must have discretion to innovate and establish new procedures for administrative appeals. *See Vermont Yankee,* 435 U.S. at 525 (''[A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts * * * to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'') (internal quotes omitted); *cf.* D. Meador & J. Bernstein, *Appellate Courts in the United States* 78–91 (1994) (differentiated internal decision tracks in federal courts of appeals, and other innovations).

The criteria used in the final rule are similar to those used by the federal courts of appeals in deciding whether to hold oral argument or to publish an opinion. The Department believes that these criteria strike the proper balance between cases that do not present novel or complicated issues that may be decided by a single Board member, and those issues that are appropriate for review by a three-member panel.

2. Particular Classes of Cases

Some commenters recommended that a full written decision by a three-member panel be required in cases denying asylum, withholding of removal, or Convention Against Torture relief.

The Department does not agree that certain classes of cases, such as those facially raising an asylum issue, should routinely be referred to a three-member panel. While asylum cases can include complex issues of law and fact, an objective review of those cases indicates that many do not. Moreover, cases involving asylum and asylum-related relief appear to make up a substantial portion of cases pending before the Board, although there are currently no statistics captured on forms of relief sought. The Department has not found evidence to support a view that every such case is profoundly complicated.

Of course, in those appeals that do raise novel or complex factual or legal issues in asylum or asylum-related cases, a respondent is permitted, even encouraged, under the provisions of this rule to state in the Notice of Appeal and elaborate in a brief, the reasons why the appeal merits review by a three-member panel under § 3.1(e)(6) of the rule. Such contentions will be reviewed in each case as part of the case management screening process.

3. Clarification of Standards for Panel Review

In the proposed rule, the Department stipulated in § 3.1(e)(6) that a Board member ''shall'' refer specific classes of cases for three-member panel review. It was not the Department's intent, however, that this language might lead to judicial enforcement of three-member panel review. Rather, the Department believes that it is appropriate for the decision to refer a case for panel review to be made on a case-by-case basis according to the judgment of the reviewing Board member under the standards of this rule. Accordingly, the mandatory ''shall'' has been changed to ''may only'' to avoid this possibility. This change does not broaden the authority of a single Board member to decide these cases, but rather provides discretion to refer the cases to a three-member panel if appropriate.

Section § 3.1(e)(6)(ii) of the proposed rule states that three-member panels have authority to review records if there is ''[t]he need to establish a precedent to clarify ambiguous laws, regulations, or procedures.'' The Department did not intend, by this language, to narrow the scope of panel review and decisionmaking to ''*Chevron* step II'' issues—*i.e.*, ''ambiguous'' questions of statutory or regulatory construction. *Chevron* v. *NRDC, supra.* On further review, the Department has revised this language to make clear that three-member panels should be able to decide all precedential questions of first impression as to the interpretation of the provisions of the Act and its implementing regulations, regardless of whether the parties or the immigration judge believe that the meaning is ''plain'' or ''ambiguous.'' Accordingly, the Department has altered this language to permit three-member panels to adjudicate cases where there is a ''need to establish precedent construing the meaning of laws, regulations, or procedure'' encompassing both the *Chevron* step II interpretive issues as well as the initial *Chevron* step I interpretation of the statute or regulation to determine the scope and implementation of clear and plain statutory language.

The Department has noted that § 3.1(e)(6)(iii) suggests that three-member review is appropriate if the error of law is ''plain[].'' This might give the impression that the Department is adopting the ''plain error'' standard of F.R. Crim. P., Rule 52(b), by which an appellate court may review errors of law that are ''plain'' even if not raised by a party. Under the context of this rule, such an interpretation would tend to limit the authority to refer cases to a three-member panel by suggesting that only ''plain error'' was referable. This was not the Department's intent and the word ''plainly'' has been deleted. If the single Board member believes that an error of law warrants three-member review, the single Board member may refer the case.

*E. De novo Review and the Clearly Erroneous Standard*

Many commenters expressed opposition to the provision in proposed § 3.1(d)(3), which provided that the Board would not engage in *de novo* review but would accept the factual findings of the immigration judges in decisions under review, including findings as to the credibility of testimony, unless the determinations are clearly erroneous. These commenters noted that the Board had asserted its authority to conduct *de novo* review of cases on appeal from the immigration judges in cases dating back to *Matter of B–*, 7 I&N Dec. 1 (BIA 1955; A.G. 1956), and as applied in many decisions since then. Several NGOs attached lists of case examples describing instances where the Board on appeal had rejected the factual determinations or the denial of relief from removal by an immigration judge.

The Department has considered these comments very carefully. The final rule adopts the approach of proposed § 3.1(d)(3) by eliminating the Board's *de novo* appellate review of factual issues before an immigration judge, but with certain modifications. Guidance has been added to the rule to clarify the standard of review in light of comments received indicating confusion over the application of the clearly erroneous standard with respect to factual determinations.

The Department is also concerned that some commenters did not have a clear understanding of the relationship between this change and the standard of review with respect to matters of law and discretionary determinations, and, accordingly, the final rule contains new language to clarify these important issues as well. Where the Board reviews what was previously called a mixed question of law and fact in the proposed rule, and is now referred to as a discretionary decision, the Board will defer to the factual findings of the immigration judge unless clearly erroneous, but the Board members will retain their ''independent judgment and discretion,'' subject to the applicable governing standards, regarding the review of pure questions of law and the

application of the standard of law to those facts. (However, when an appeal is taken from a decision of a Service officer, the standard of review will remain *de novo*.)

1. *De novo* and Clearly Erroneous Standards of Review of Factual Determinations by the Immigration Judges

The Department received a number of comments opposed to elimination of *de novo* appellate review of determinations of facts by the immigration judges and the substitution of a ''clearly erroneous'' standard of review. The commenters generally asserted that eliminating the Board's *de novo* appellate review of factual issues will result in an overall denial of due process. Commenters also expressed their opinions that, because immigration judges occasionally misstate or omit important facts, and country conditions change, substituting ''clearly erroneous'' review for *de novo* review of facts will compel the Board to perform a brief, cursory review of the record, resulting in decisions that do not accurately reflect the facts.

The Department has determined that the proposed rule eliminating *de novo* review of facts by the Board and replacing it with ''clearly erroneous'' review should remain intact, with appropriate clarifications. The Department does not accept the suggestions that a clearly erroneous standard of review, as provided in this rule, will lead to decisions by the Board that ''rubber stamp'' the decisions of the immigration judges without thoughtful review or analysis, or that retaining *de novo* review by the Board is necessary in order to deal with erroneous decisions by immigration judges who are ''antagonistic, biased and ignorant,'' in the words of one commenter.

A finding is ''clearly erroneous'' when, although there is evidence to support it, the reviewing Board member or panel is left with the definite and firm conviction that a mistake has been committed. A factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder. *Anderson* v. *City of Bessemer,* 470 U.S. 564, 573 (1985).

The ''clearly erroneous'' standard reflects the major role of immigration judges under the Act and implementing regulations as determiners of facts. In removal proceedings, it is the immigration judges, not the Board, who have been given authority to ''administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.'' 8 U.S.C. 1229a(b)(1). Moreover, immigration judges are generally in the best position to make determinations as to the credibility of witnesses. *See Matter of A–S–*, 21 I&N Dec. 1106 (BIA 1998); *Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994). Immigration judges conducting the hearings are aware of variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. *See Wainwright* v. *Witt,* 469 U.S. 412 (1985).

Accordingly, even under its present authority to conduct *de novo* review of the facts, the Board gives ''significant weight to the determinations of the immigration judge regarding the credibility of witnesses'' as well as to ''other findings of an immigration judge that are based upon his or her observance of witnesses.'' *Matter of Burbano,* 20 I&N Dec. at 874 (citations omitted); *see Matter of A–S–*, 21 I&N Dec. at 1108–1112. The Department believes that this deference is appropriate. Indeed, as we have discussed above, the Board has long engaged in the practice of adopting and affirming the immigration judges' factual determinations and decisions, for the reasons stated in the immigration judges' decisions, and this is ''not only common practice, but universally accepted.'' *Giday* v. *INS,* 113 F.3d 230, 234 (D.C. Cir. 1997); *see, e.g., Chen* v. *INS, supra; Prado-Gonzalez* v. *INS,* 75 F.3d 631, 632 (11th Cir. 1996); *Alaelue* v. *INS,* 45 F.3d 1379, 1382 (9th Cir. 1995).

Thus, for example, it is well established that, because the immigration judge has the advantage of observing the respondent as the respondent testifies, the Board already accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues. *See Matter of A–S–*, 21 I&N Dec. at 1109–1112; *Matter of Burbano,* 20 I&N Dec. at 874; *Matter of Pula,* 19 I&N Dec. 467, 471–72 (BIA 1987); *Matter of Kulle,* 19 I&N Dec. 318, 331–32 (BIA 1985), *aff'd,* 825 F.2d 1188 (7th Cir. 1987), *cert. denied,* 484 U.S. 1042 (1988). Under certain circumstances, the Board may not accord deference to an immigration judge's credibility finding where that finding is not supported by the record. *See, e.g., Matter of B–*, 21 I&N Dec. 66, 70–71 (BIA 1995); *Matter of B–*, 7 I&N Dec. 1, 32 (BIA 1955; A.G. 1956). However, because an immigration judge has the ability to see and hear the respondent, which the Board and the courts of appeals do not, if the immigration judge's reasons for an adverse credibility finding are supported by specific and cogent reasons with respect to inconsistencies and omissions with respect to a respondent's claim, observations of the respondent's demeanor, and reasonable inferences from those indicia, the Board will not disturb an adverse credibility finding. *Matter of A–S–*, *supra.*

In *Matter of A–S–*, the Board concluded that it would defer to the credibility findings of an immigration judge, but only if (1) the record reveals that the discrepancies and omissions described by the immigration judge are actually present; (2) the discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has not supplied a convincing explanation for the discrepancies and omissions. 21 I&N Dec. at 1109–1111. The Department believes that these standards offer some appropriate guidance, but should be applied to the broader factfinding process. That is, under this rule, the Board should start from the premise that it will accept the findings of fact made by the immigration judge, unless the Board identifies specific reasons, including the inverse of those stated in *Matter of A–S–*, for forming a definite and firm conviction that a mistake has been made.

The rationale for changing to a ''clearly erroneous'' standard of review of fact findings is not limited to the consideration that immigration judges may be better positioned than the Board to decide factual issues, including issues of credibility. *See generally Anderson,* 470 U.S. at 574–75. As the Supreme Court has opined in another setting, the ''clearly erroneous'' standard rather than a *de novo* standard of review is appropriate for factfindings by trial courts because ''[d]uplication of the trial judge's efforts [by an appellate body] would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'' *Id.* ''[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one'' and ''requiring them to persuade three more judges at the appellate level is requiring too much.'' *Id.* at 575. The ''clearly erroneous'' standard of review recognizes that an evidentiary hearing on the merits should be the '' 'main event' * * * rather than a 'tryout on the road.' '' *Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977).

Just as the Supreme Court has concluded that on balance the ''clearly erroneous'' standard is an effective, reasonable, and efficient standard of

appellate review of factual determinations by federal district courts, *see Anderson,* 470 U.S. at 574–75, and Fed. R. Civ. P. 52(a), the Department has concluded that the ''clearly erroneous'' standard is an effective, reasonable, and efficient standard for appellate administrative review of factual determinations by immigration judges. The ''clearly erroneous'' standard is duly protective of the Department's legitimate institutional interests in the effective adjudication of administrative appeals and eliminating the duplication of resources involved in successive *de novo* factual determinations, first by immigration judges and then the Board. At the same time, it allows for the correction of fact findings in the rare case where the Board is left with the definite and firm conviction that a mistake has been committed. *See generally United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). Therefore, in the administrative immigration system, the Department has determined that the ''clearly erroneous'' standard of review—with its deference to the initial factfinder—should be ''the rule, not the exception.'' *See generally Streamlining Study, supra.*

This is not a novel standard in the administrative process; rather, similar standards have been applied within agency review proceedings for many years. *See, e.g.*, 10 CFR 2.786 (Nuclear Regulatory Commission; domestic licensing proceedings; review of decisions of a presiding officer); 17 CFR 201.411 (Securities and Exchange Commission; consideration of initial decisions by hearing officers); 20 CFR 422.114 (Social Security Administration; annual wage reporting process); 29 CFR 1614.405 (EEOC; decisions on appeals); 40 CFR 124.19 (EPA; appeal of certain permits). The Department believes there is ample authority and experience to apply this standard to the agency review process in immigration proceedings.

2. ''Correction'' of Clearly Erroneous Factual Determinations

The Department's adoption of the ''clearly erroneous'' standard encompasses the standards now commonly used by the federal courts with respect to appellate court review of findings of fact made by a trial court. *See Dickinson* v. *Zurko,* 527 U.S. 150, 153 (1999). Under this standard, an appellate tribunal merely has authority to reverse erroneous fact findings and no authority to correct them. *See id.* However, it has been pointed out that the word ''correct'' in proposed § 3.1(e)(6) might appear to give three-member panels authority to go beyond the traditional ''clearly erroneous'' standard used in such review and to engage in de novo factfinding to ''correct'' clearly erroneous facts. This was not the Department's intent and § 3.1(e)(6) has been revised.

3. Clearly Erroneous Standard Applied

One of the more complicated contexts in which the clearly erroneous standard will be applied is in the area of asylum. For example, the Board has established standards for immigration judges to make credibility determinations. *Matter of A–S–*, supra. These standards involve several different types of findings: whether inconsistencies exist, whether omissions in an application indicate exaggeration in testimony, or whether a respondent has indicated through his or her demeanor that he or she is being less than truthful.

The ''clearly erroneous'' standard will apply only to the factual findings by an immigration judge, including determinations as to the credibility of testimony, that form the factual basis for the decision under review. The ''clearly erroneous'' standard does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to ''past persecution'' or a ''well-founded fear of future persecution.''

The distinction requires a more refined analytical approach to deciding cases, but focuses on the qualities of adjudication that best suit the different decisionmakers. Immigration judges are better positioned to discern credibility and assess the facts with the witnesses before them; the Board is better positioned to review the decisions from the perspective of legal standards and the exercise of discretion.

For example, under section 208 of the Act, a respondent may establish eligibility for asylum by showing that he has been persecuted on account of a protected ground under section 101(a)(42) of the Act, *e.g.*, religion. *See generally Matter of Chen,* 20 I&N Dec. 16 (BIA 1989). The immigration judge's determination of ''what happened'' to the individual is a factual determination that will be reviewed under the clearly erroneous standard. The immigration judge's determinations of whether these facts demonstrate harm that rises to the level of ''persecution,'' and whether the harm inflicted was ''on account of'' a protected ground, are questions that will not be limited by the ''clearly erroneous'' standard.

Similarly, in cancellation of removal, those facts that a respondent claims make up ''exceptional and extremely unusual hardship'' to a respondent's putative qualifying relative under section 240A(b)(1)(D) of the Act, and whether the putative qualifying relative is actually a qualifying relative, will be reviewed by the Board only to determine if the immigration judge's determination was clearly erroneous. Whether those facts, as determined by the immigration judge and found not to be clearly erroneous, amount to ''exceptional and extremely unusual hardship'' under the Act may be reviewed by the Board *de novo. See, e.g., Matter of Andaloza-Rovas,* 23 I&N Dec. 319 (BIA 2002) (evaluation of legal standard; *de novo* review leading to reversal of immigration judge's grant of relief); & *id.* at 330–331 n.1 (Osuna, dissenting, suggesting reliance on immigration judge's factfinding leads to a different evaluation); *Matter of Monreal-Aguinaga,* 23 I&N Dec. 56 (BIA 2001) (evaluation of whether hardship to qualifying relatives is ''substantially different from, or beyond, that which would normally be expected'' from the removal of the respondent).

Third, in both of these two examples, the underlying statutes grant the Attorney General discretion to grant relief. This ''discretionary'' determination can likewise be considered under this dichotomy. What have historically been referred to as ''equities'' are facts that the respondent establishes in his or her case, and these factual determinations by an immigration judge may be reviewed by the Board only to determine if they are clearly erroneous. However, the ''discretion,'' or judgment, exercised based on those findings of fact, and the weight accorded to individual factors, may be reviewed by the Board *de novo.*

Thus, properly understood, the ''clearly erroneous'' standard will only apply to the specific findings of fact by the immigration judges, and will not limit the Board to reviewing discretionary determinations. Accordingly, in reviewing the various decisions of the immigration judges, the Board will still be able to consider and resolve instances where ''differing decisions may be reached based on essentially identical facts.'' *Matter of Burbano,* 20 I&N Dec. at 873. For these reasons, the Department does not agree with the comments suggesting that the ''clearly erroneous'' standard would ''severely reduce'' the Board's ability to act as a check against the wide disparities in discretionary decisions by the immigration judges to grant or deny relief in factually similar cases.

4. Harmless Error

Several commenters expressed the view, in essence, that there exists a gap between review of all facts *de novo* and a ''clearly erroneous'' threshold. They argue that the immigration judges frequently misstate facts that require further review.

The Department agrees that in some cases an immigration judge may misstate facts, but disagrees that in all such cases further adjudication of those facts is necessary. In many instances, such errors, or perceived errors, do not prejudice a respondent, and are, in effect, harmless errors. Section 3.1(e)(4) of the rule provides that summary affirmance is only appropriate if the single Board Member determines that ''any errors in the decision under review were harmless or nonmaterial'' and all other conditions apply. Thus, an affirmance without opinion signifies that any such error is considered to be harmless. Historically, many cases are appealed to the Board on the basis of perceived factual errors in an immigration judge's decision that are, in fact, harmless or immaterial. For example, an immigration judge's misstatement of a fact in evaluating whether a nonimmigrant respondent seeking cancellation of removal had established a particular element of ''exceptional and extremely unusual hardship'' under 8 U.S.C. 1229b(b)(1)(D) of the Act is not a harmful, prejudicial, or material error if the immigration judge also concluded that the respondent had not accrued the required 10 years of continuous physical presence under subsection (b)(1)(A). A single-member brief order may elaborate on why such an error is harmless and not prejudicial.

By contrast, where a material finding of fact is clearly erroneous, the Board may review the record before a three-member panel under § 3.1(e)(6)(v). This is precisely the function of a three-member panel.

5. Litigation Concerns

Some commenters were also of the opinion that if the Board reviews fact findings to determine if they are ''clearly erroneous,'' as opposed to deciding the facts *de novo,* courts will give less deference to the agency's decisions and more cases will be remanded to the immigration judges for further factfinding; they allege this to be true particularly in cases where an asylum applicant is alleging changed country conditions. Consequently, the commenters were of the opinion that by implementing a ''clearly erroneous'' standard of review for facts, the Board's appellate decisionmaking would become less, rather than more, timely and efficient.

The Department disagrees with this evaluation. Under the Act, courts of appeals must apply a highly deferential ''substantial evidence'' standard in reviewing administrative factfinding in removal orders, including the findings made regarding asylum and changed country conditions. *See INS* v. *Elias-Zacarias,* 502 U.S. 478, 481 (1992) (substantial evidence standard required for asylum determinations); 8 U.S.C. 1252(b)(4)(B) (''administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary''). Where the Act precludes direct review in the courts of appeals, district courts have limited jurisdiction to review removal orders by means of habeas corpus, encompassing only purely legal challenges to removal orders. *INS* v. *St. Cyr,* 533 U.S. 289, 306, 314 n.38 (2001). Habeas review does not permit review of administrative factfinding, except perhaps to determine whether such facts are ''unsupported by any evidence.'' *Id.* at 306 n.27.

Accordingly, the commenters' concerns that courts may choose to accord less deference to administrative factfinding and may reverse the Board more frequently if the Board reviews appeals under a ''clearly erroneous'' standard are not well founded. Such concerns overlook the courts' inability to alter the standard of review, and their obligation of deference to the Attorney General's factfinding (by whatever means such authority is exercised).

The Department recognizes that increasingly, and particularly in asylum cases, some courts have failed to defer to administrative factfinding. *See, e.g., Abovian* v. *INS,* 257 F.3d 971 (9th Cir. 2001) (Kozinski, O'Scannlain, T.G. Nelson, Kleinfeld, Graber, Tallman, Rawlinson, JJ., dissenting from denial of rehearing *en banc*); *Agbuya* v. *INS*, 219 F.3d 962, 967 (9th Cir. 2000) (Hall, J., dissenting); *Briones* v. *INS*, 175 F.3d 727, 730 (9th Cir. 1999) (*en banc*) (O'Scannlain, J., dissenting); *Borja* v. *INS*, 175 F.3d 732, 738 (9th Cir. 1999) (*en banc*) (O'Scannlain and Kleinfeld, JJ., dissenting); *Mgoian* v. *INS*, 184 F.3d 1029, 1037 (9th Cir. 1999) (Rymer, J., dissenting). The Department disagrees with such an approach, and therefore does not consider it appropriate to alter the nature of the Board's appellate review to conform to it.

6. *De novo* Review by the Attorney General

Some commenters suggested that it was inappropriate for the Attorney General to adopt a ''clearly erroneous'' standard for the Board, but use a *de novo* standard himself in reviewing the Board's determination, such as in *Matter of Y-L-,* 23 I&N Dec. 270 (A.G. 2002). This suggestion misapprehends the different roles of the Attorney General and the Board. As discussed above, the Attorney General is charged not merely with adjudicating immigration matters, but with establishing policy and managing the immigration process. The Board, on the other hand, is delegated authority by the Attorney General to adjudicate cases before it, not make policy or manage the immigration process. It is appropriate for the Attorney General to exercise broader authority than he delegates to the Board.

7. Review of Service Decisions

The comments on *de novo* review have raised an issue of the scope of review of factual determinations by officers of the Service in decisions under review by the Board. Review of decisions by the district director and other Service officers do not have the benefit of a full record of proceedings or, except in rare cases, a transcript of hearings before an independent adjudicating officer. Rather these decisions are made on applications and interviews, and other information available to the Service.

In light of this difference, the Department has clarified the language of the final rule to retain *de novo* review of Service officer decisions, either by a single Board member or by a three-member panel. Accordingly, § 3.1(d)(3) has been revised to retain the Board's authority to review decisions of the Service *de novo.* The process for initial single Board member review will be retained, but the scope of review is broadened. The same standards for referral to a three-member panel will be applied.

*F. New Evidence and Taking Administrative Notice of Facts*

Section 3.1(d)(3) of the proposed rule also generally prohibits the introduction and consideration of new evidence in proceedings before the Board, except for taking administrative notice of commonly known facts such as current events, or the contents of official documents such as country condition reports prepared by the Department of State.

Several commenters suggested that the rule would alter the Board's authority to administratively notice facts. Some commenters believed that a broadening of the authority to administratively notice facts was appropriate, while others argued that

the Board should, in essence, not be able to take administrative notice of facts without providing a hearing. Where it is established that an appeal cannot be properly resolved without further findings of fact, other than those established by administrative notice, the Board will remand the proceeding to the immigration judge.

The rule codifies existing Board precedent holding that new facts will not be considered on appeal. The ''clearly erroneous'' standard of review, in contrast to the *de novo* standard of review, is also consistent with the longstanding policy of the Board, now codified in § 3.1(d)(3), of not considering evidence filed on appeal. The Board reviews the record of proceedings made before the immigration judge. *Matter of Fedorenko,* 19 I&N Dec. 57, 73–4 & n.10 (BIA 1984); *Matter of Haim,* 19 I&N Dec. 641 (BIA 1988). Under existing practice, new evidence would be considered at the appeal stage through a motion to remand. *See generally* G. Hurwitz, *Motions Practice Before the Board of Immigration Appeals,* 20 *San Diego L. Rev.* 79, 91–2 (1982). *See Matter of Coelho,* 20 I&N Dec. 464, 471–2 (BIA 1992). *See also* 8 CFR 3.2(c) (2001).

Contrary to the assertions of several commenters, this rule does not disturb the Board's authority to take administrative notice of commonly known facts. The Board may, and does, take administrative notice of commonly known facts such as agency documents and current events. *See e.g. Matter of S–M–J–,* 21 I&N Dec. 722, 733 n.2 (BIA 1997), *disapproved on other grounds, Ladha* v. *INS,* 215 F.3d 889 (9th Cir. 2000); *Kaczmarczyk* v. *INS,* 933 F.2d 588, 593 (7th Cir. 1991). The language of the regulation explicitly uses the phrase ''commonly known facts'' to describe the kinds of facts or matters of which the Board may take administrative notice, giving by way of example ''current events'' or ''the contents of official documents.'' The Department intends by use of this language to make clear that the Board may take administrative notice not only of current events but also of the contents of official documents such as the country condition reports prepared by the Department of State, including its foreign policy expertise, analysis, and opinion.

The Department does note, however, that there is an intercircuit conflict over the degree to which the Board may take administrative notice of facts without first providing notice and an opportunity to respond.[7] After reviewing the comments, the Department agrees with those courts that have found post-decision motions to reconsider and reopen under 8 CFR 3.2, alleging a specific error of fact (the administratively noticed fact), to be sufficient to preserve a respondent's constitutional due process rights.

In immigration proceedings, the administrative notice of facts—usually relating to country conditions—revolves on issues that form the respondent's burden of proof for relief from removal. The most common facts about country conditions appropriate for administrative notice are those contained in country reports and profiles prepared by experienced foreign service officers in the Department of State who are experts on specific regions and countries. As the courts have recognized, they, the immigration judges, and the Board owe deference to the Department of State on such matters of foreign intelligence as assessments of conditions.[8] Some commenters relied upon the opinions expressed by NGOs in disputing the deference that should be given to Department of States reports and profiles, either directly or through administrative notice of facts and official documents. However, reports by NGOs are simply not as reliable as those of the Department of State because the mission of those organizations is to advocate specific ideas and views, their positions are often based on anecdotal experiences of identified and unidentified persons, and their opinions tend to lack the discernment and expertise of those provided by the Department of State.

The important, complicated, delicate, and manifold problems of assessing conditions in a foreign country warrant deference to those whose expertise the United States tasks with that duty. It is the respondent's responsibility to present facts on the record that refute those assessments. The Department believes that, given this required deference, *post hoc* rebuttal of administratively noticed facts is appropriate and sufficient for due process purposes. Accordingly, the Department has not altered the final rule in response to these comments. Nonetheless, the Board is mindful of the limitations on the use of administrative notice in those circuits that have contrary precedents.

In light of the intercircuit conflict and the deference that is due such Department of State reports and profiles, the Department believes that a compelling case is made for a liberal interpretation of the rule on reconsideration and reopening in cases in which the Board has administratively noticed facts such as a Department of State country report. Accordingly, the Department is of the view that in any case in which the Board takes administrative notice of a specific fact by reference to any documentary evidence, *e.g.*, a Department of State country report or profile published after the immigration judge's decision), not

[7] The First, Seventh, Ninth, and Tenth Circuits have held that it is a violation of due process for the board to take administrative notice of new facts on appeal without affording notice and an opportunity to respond. In the Ninth and Tenth Circuits the board must provide notice and an opportunity to respond before taking administrative notice. *Kowalczyk* v. *INS,* 245 F.3d 1143 (10th Cir. 2001); *de la Llana-Castellon* v. *INS,* 16 F.3d 1093, 1099–1100 (10th Cir. 1994); *Castellon-Villagra* v. *INS,* 972 F.2d 1017 (9th Cir. 1992) (motion to reopen does not provide adequate opportunity to rebut administrative notice of changed country conditions and due process requires BIA to give prior notice and opportunity to rebut). In other circuits a post-decision motion to reopen, or, more properly, a motion to reconsider, disputing the taking of administrative notice is a sufficient remedy. *Gonzalez* v. *INS,* 77 F.3d 1015, 1024 (7th Cir. 1996) (rejecting approach of 9th and 10th circuits and holding that ''mechanism of the motion to reopen * * * 'allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts,' [and] provides a sufficient opportunity to be heard to satisfy the requirements of due process''). *Accord Gutierrez-Rogue* v. *INS,* 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz* v. *INS,* 948 F.2d 962, 968–69 (5th Cir. 1991), rehearing denied, 954 F.2d 723 (1992). The First Circuit initially adopted the position that a post-decision motion to reopen is sufficient to satisfy due process but may not continue to hold that view. *Compare Gebremichael* v. *INS,* 10 F.3d 28 (1st Cir. 1993) (''We agree with the majority of those circuits which have addressed the question that [a post-decision] motion to reopen * * * can *ordinarily* satisfy the demands of due process.'') (emphasis added, citations omitted), *with Fergiste* v. *INS,* 138 F.3d 14, 19 n.4 (1st Cir. 1998) (declining to decide whether reliance on extra-record evidence of changed country conditions violated procedural due process without pre-decision notification, but reinterpreting *Gebremichael* to state that ''[o]ur holding in that case was not * * * that a motion to reopen is always necessary and sufficient to protect an alien's rights [but] [r]ather * * * that 'the demands of due process will, as always, ultimately depend on the circumstances' '').

[8] *See Sevoian* v. *Ashcroft,* 290 F.3d 166, 176 (3rd Cir. 2002), *quoting Kazlaukas* v. *INS,* 46 F.3d 902, 906 (9th Cir. 1995); *Gonahasa* v. *INS,* 181 F.3d 538, 542 (4th Cir. 1999) (describing these reports as ''highly probative evidence in a well-formed fear case''); *Marcu* v. *INS,* 147 F.3d 1078, 1081 (9th Cir. 1998) (reliance on reports ''makes sense because this inquiry is directly within the expertise of the Department of State''); *Gailius* v. *INS,* 147 F.3d 34, 46 (1st Cir. 1998) (Department of State opinions ''receive considerable weight in the courts because of the * * * Department's expertise''); *Rojas* v. *INS,* 937 F.2d 186, 190 n.1 (5th Cir. 1991) (Department of State a ''relatively impeccable source[]'' for information on political conditions in foreign countries); *Koliada* v. *INS,* 259 F.3d 482 (6th Cir. 2001) (deference due even though Department of State report reproduced for the Service in support of litigation); *Mitev* v. *INS,* 67 F.3d 1325, 1332 (7th Cir. 1995) (''we give great [deference] to [Department of State] opinions on matters within its area of expertise'').

theretofore in the record of proceedings, either party may file as part of a motion to reopen any contradictory documentary evidence (*e.g.*, a contradictory report by a third party such as Amnesty International), which shall be considered, for the purpose of this section, to have been not available and which could not have been discovered and presented at the former hearing. If administrative notice is taken of a fact, then the parties should have the opportunity to challenge that fact. The Department's interpretation is that the ''not available'' and ''could not have been discovered'' requirements of section 3.2(c) should not stand in the way of such a review and determination on the merits of the motion. If the motion has merit and additional factfinding is required, the Board may reconsider and vacate its decision, reopen proceedings, and remand the record to the immigration judge.

*G. Reduction in Size of the Board*

The proposed rule provided that, after the transition period of 180 days has elapsed, the final structural reform of the Board will occur. The number of Board members will be reduced to 11, with the Attorney General designating the membership of the Board. After reviewing the comments, the Department has determined to retain the reduction of the size of the Board to 11, as proposed.

We note at the outset that two individuals who understand the Board well from their previous experience as Board members, and who testified before the House Judiciary Subcommittee, both agreed that the size of the Board should be reduced but differed over the proper reduction—one arguing for a reduction to no more than 9 while the other suggested 16. Testimony of M. Heilman and L. Mathon, House Judiciary Subcommittee Hearing, 10, 13, 18.

The Department has determined that 11 Board members is the appropriate size for the Board based on judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload. The Board is expected to function with two three-member panels and five Board members acting individually in deciding cases. The Department believes that this is a realistic evaluation of the resource needs, capacities and resources of the Board in adjudicating immigration issues. The Attorney General may reevaluate the staffing requirements of the Board in light of changing caseloads and legal requirements following implementation of the final rule.

1. Quality of Board Member Personnel

Several commenters questioned how this reduction would occur. Commenters objected to the reduction stating generally that it raises constitutional issues, but without significant elaboration. These commenters either supported maintaining the current number of Board members or supported an increase in the number of Board members, staff, and resources. Comments concerned the transition period, in which the backlog of cases will be eliminated and the Board size reduced.

A few commenters stated that the reduction could be perceived as part of a design to eliminate Board members with whom the Attorney General disagrees and noted that diverse Board member opinions are important. Several commenters asserted that, during the 180-day transition period, Board members would be ''auditioning'' to keep their jobs and that it would affect the perceived impartiality of current Board members given that it was announced before the backlog was reduced.

The Department has already addressed, in part III.B above, the general comments asserting that reducing the number of Board members would adversely affect the due process of respondents by affecting the independence and perceived impartiality of the Board.

The Department expects that the reduction in the number of Board member positions will be effectuated by the Attorney General from among the current Board Members, after consultation with the Director of the Executive Office for Immigration Review (EOIR) and the Board Chairman, but that determination remains one that is within the discretion of the Attorney General. As EOIR Director Rooney pointed out in testimony before a subcommittee of the House Judiciary Committee, the Attorney General generally looks to traditional factors that guide the selection of adjudicators, such as experience, judicial temperament, and efficiency, particularly in an experienced adjudicator. Testimony of K. Rooney, House Judiciary Subcommittee Hearing, 37–38. The Department expects that the final determinations will be made on factors including, but not limited to, integrity (including past adherence to professional standards), professional competence, and adjudicatorial temperament. *Cf.*, D. Meador, M. Rosenberg, & P. Carrington, eds., *Appellate Courts: Structures, Functions, Processes and Personnel* (1994), 671–681 (varying views on the qualifications of judges in the judicial setting rather than the administrative adjudication setting); D. Meador & J. Bernstein, *Appellate Courts in the United States* (1994), 94–99.

In the end, however, it is not possible to establish guidelines or specific factors that will be considered, nor should the Attorney General limit his decisionmaking process. The decision as to the relative values and the weights given to those values belongs to the Attorney General. Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission. Moreover, and of critical importance, the Department has not indicated that any of the existing Board members will be adversely affected by the reduction in the number of Board members. Until the Attorney General makes these personnel decisions, such comments are, at best, speculative.

A few commenters supported reduction based solely on seniority. While seniority is an experience indicator, the Department does not believe that it should be considered a presumptive factor.

Several commenters have suggested that the Attorney General must appoint individuals to the Board who are expert in immigration law. The Department believes that this argument rests on the faulty premise that immigration law is the only area of the law where Board members must have expertise. Although immigration law is a unique blend of foreign and domestic concerns, it is not so discrete and insular in nature.

In reality, immigration law is part of the larger body, and requires a more global view, of federal law. The Board is no longer, and perhaps never has been, a body whose decisions relate only to the interpretation of the Act and regulations. More frequently now than ever before, the Board decides cases based on the criminal law, and expertise in that area of the law is also required of the Board.[9] Accordingly, it is not

[9] The Board has interpreted, since its inception, what constitutes a ''crime involving moral turpitude.'' *See Matter of G–*, 1 I&N Dec. 8 (BIA, A.G. 1940) (interpreting 1917 Act); 8 U.S.C. 1182(a)(2)(A)(i), 237(a)(2)(A)(i). An increasing

Continued

merely expertise in immigration law that must guide the Attorney General's decisions on immigration law and policy, or to whom to delegate authority to make immigration decisions, but also expertise in the inextricably interrelated criminal law. By the same token, the Board's determinations under the Refugee Act of 1980, 8 U.S.C. 1158, and implementing regulations, 8 CFR part 208, necessarily include both facts and inferences from the expertise of the Department of State on matters of foreign conditions. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference due Attorney General's, and hence Board's, role in foreign policy); *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (foreign policy considerations in immigration proceedings).

2. Resource Requirement Concerns

A number of commenters expressed the view that the current case backlog reflects the need for more resources. In their view, increased attorney and paralegal staffing, as well as filling all existing Board member positions, would be a preferable method of reducing the backlog.

As described above, beginning in 1995, the Department sought to aid the Board in reducing its burgeoning caseload by increasing its size from 5 to 23 Board members with increases in its attorney and support staff.[10] It is now evident that the Board does not face a ''personnel-budget'' problem but rather a fundamental systemic problem. The continued expansion of the Board has not effectively reduced the existing case backlog. The one element that has begun to help reduce the backlog—streamlining—is being expanded through this rule. By expanding the number of cases that can be resolved either through a summary affirmance without opinion, or by a short written order by a single Board member, this process will substantially free up the staff resources of the Board to focus on backlog reduction and the preparation of careful legal and factual analyses in cases meriting three-member panel review, including cases to be designated as precedent decisions.

3. Advantages of a Smaller Board

The Department believes that the continued expansion of the Board has, indeed, had significant institutional costs including effects on the cohesiveness and collegiality of the Board's decision making process, and the Department's perception of the uniformity of its decisions, and an administrative and supervisory strain on the Board's staff. *Cf.* Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* 16–21 (1975). These costs have been magnified by substantial changes in the immigration laws and have resulted in unnecessary delays in issuing final agency decisions. This continued expansion has shifted the Board's attention away from providing nationwide guidance on those cases presenting difficult and repetitive or controversial legal questions. Testimony of M. Heilman, House Judiciary Subcommittee Hearings 13, 16. The institutional cost of unlimited expansion is not a new phenomenon, but one that has been experienced in the federal court system. *See generally Structural Alternatives*, at 29–57. At the same time, the Board's precedent decisions indicate an inability to reach consensus about even fundamental approaches to the law.

Accordingly, the Department agrees with certain comments that the reduction in the number of Board members should increase the coherence of Board decisions and facilitate the *en banc* process, thereby improving the value of Board precedents.[11] The Department believes that more and clearer precedent will be of greater assistance to the immigration judges, practitioners, and respondents.

Another commenter argued that reducing the number of Board members combined with increasing single-member review will save American taxpayers money. It is not clear to the Department that the cost of operating the Board will substantially be reduced, nor does the Department plan to propose a substantial reduction in budget outlays. However, by further expediting the disposition of cases for aliens currently held in detention, the Department expects to realize savings in the costs of detaining such aliens pending their removal from the United States. In addition, the Department believes that following implementation of the streamlining process and this rule, maintaining the current number of Board members will be unnecessary. With greater efficiency, fewer Board members will be needed to adjudicate the caseload. A reduction to 11 Board members will allow for the most efficient use of resources to adjudicate administrative appeals on a timely basis.

*H. Case Processing Issues*

Section 3.1(e)(8) of the proposed rule, as well as §§ 3.3 and 3.5, established new time limits for several elements of the appellate process while maintaining several aspects of current Board practice. Some commenters implied that these time limits could create justifiable rights. The Department disagrees. These internal management limitations are intended only to provide direction for the management of the Board, not establish any right or remedy in litigation. *See United States* v. *Caceres*, 440 U.S. 741 (1979).

In response to the public comments, the Department has changed the briefing process, establishing a distinction between detained and non-detained cases. For detained cases, the final rule establishes a simultaneous briefing process, with a time limit of 21 days for the filing of briefs by each party. For non-detained cases, the Department is retaining a sequential, but reduced, briefing schedule, allowing the appealing party 21 days in which to file a brief, and allowing the opposing party 21 days to respond. As in the proposed

number of recent Board decisions have focused on the interrelationship of provisions of the criminal Code, the United States Sentencing Guidelines, and the Act. For example, the term ''aggravated felony'' defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43), is referenced in the United States Sentencing Guidelines as the controlling definition for certain sentencing enhancements. U.S.S.G. 2L1.2(b)(2). The definition of ''crime of violence'' that makes up one of the definitions of an aggravated felony is defined by 18 U.S.C. 16. ''Drug trafficking,'' another aggravated felony, is defined in 18 U.S.C. 924. The Board has, at times struggled with this panoply of legal provisions. *See, e.g., Matter of K–V–D–*, 22 I&N Dec. 1163 (BIA 1999), *overruled, Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002) (whether conviction under state law constitutes drug trafficking under section 101(a)(43)(B) of the Act); *Matter of Vasquez-Muniz*, 22 I&N Dec. 1415 (BIA 2000), *rev'd* 23 I&N Dec. 207 (BIA 2002) (whether an offense defined by state or foreign law may be classified as an aggravated felony as an offense ''described in'' a federal statute enumerated in section 101(a)(43) of the Act even if it lacks the jurisdictional element of the federal statute); *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002), *overruling Matter of Puente-Salazar*, 22 I&N Dec. 1006 (BIA 1999), *and Matter of Magallanes-Garcia*, 22 I&N Dec. 1 (BIA 1998) (whether driving while intoxicated under various state criminal laws constitutes crime of violence under 18 U.S.C. 16(b) and an aggravated felony under section 101(a)(43)(F) of the Act). This complex interrelationship of the immigration law and the criminal law has also lead to recent precedent decisions by the Attorney General. *Matter of Y–L–* 23 I&N Dec. 270 (A.G. 2002), *overruling Matter of S–S–*, 22 I&N Dec. 458 (BIA 1999); *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), *disapproving Matter of H–N–*, 22 I&N Dec. 1039 (BIA 1999).

[10] The Board currently has 19 members and 4 vacancies, which the Department has declined to fill in light of the fact that the expansion has not achieved the desired results based upon historical staffing levels.

[11] The Department notes that not all of the Board precedent decisions are issued *en banc*. Under 8 CFR 3.1(g), the Board designates particular decisions for publication as precedent decisions, but the Board can and frequently does designate a three-member panel decision as a precedent decision.

rule, an immigration judge will have 14 days to review the transcript and approve a decision (or 7 days after returning from an absence from the court).[12] Also as in the proposed rule, an appealing party asserting that a three-member review is warranted must do so in the Notice of Appeal within the period allowed for an appeal. Once the record is completed and ready for adjudication, single Board member decisions must generally be made within 90 days and three-member decisions must be made within 180 days. Provisions for discretionary extensions of time have been expanded. The Department has also retained the provisions of the proposed rule on rehearings *en banc*.

1. Simultaneous Briefing

Several commenters expressed concern that the practice of simultaneous briefing, coupled with a shorter time frame, raises due process concerns because it would be unfairly burdensome to immigration practitioners and pro se litigants. Some commenters believe that, as a consequence of the compressed time frame, pro bono representation would decrease because of the difficulties associated with the new rule. Many commenters asserted that pro se respondents who are unfamiliar with English and the immigration laws will be unable to effectively articulate their position on appeal or to anticipate and rebut arguments presented by the Service. Furthermore, a few commenters argued that detained respondents will not even have the benefit of the 21-day period due to systemic problems in receiving the transcripts and briefing schedules in a timely manner while they are either detained or being moved to other detention facilities. Finally, multiple commenters suggested that the reduced time frame would result in hastily drafted briefs that would be unhelpful to the Board in deciding appeals.

After reviewing the comments received, the Department has decided to change the proposed regulation with respect to the simultaneous briefing process but otherwise maintain the time limits as proposed. The final rule modifies the existing 8 CFR 3.3(c) by creating a distinction between detained and non-detained cases. In detained cases, the Department maintains its position that a 21-day simultaneous briefing schedule is sufficient. Simultaneous briefing is the common practice in detained cases. See, *e.g.*, *Matter of Jean*, 23 I&N Dec. 373, 380 (A.G. 2002) (addressing simultaneous briefing before the Board in detained cases).

In non-detained cases, the Department will retain the proposed 21-day briefing schedule, but agrees with the commenters that this should be a sequential briefing schedule, which is currently the common practice in non-detained cases. Under existing regulations, parties are allowed 30 days each in which to file briefs (for a total of up to 60 days). Under the final rule, for non-detained cases, after a transcript is made available, the Board will establish a 21-day sequential briefing schedule. The ability of either party to seek an extension of the period for filing a brief or reply brief up to 90 days for good cause shown remains from current Board practice. The Department approves of the Board's current practice of granting extensions of only 21 days. Beyond that, the Board retains its discretion to consider briefs and reply briefs that are filed out of time. Furthermore, the parties also retain their ability to file motions to reconsider after the Board has rendered a decision. 8 CFR 3.2(b).

2. Transcript Timing

Other commenters indicated that, because the availability of a transcript is beyond an appellant's control, an appellant might be unfairly surprised by its arrival and unable to prepare a brief within the time frame. Some commenters stated that, in their experience, it has sometimes taken a year or more for the preparation of transcripts after the filing of an appeal with the Board.

The Department agrees that substantial delay in the production of transcripts in many cases has been a serious problem. The earlier a transcript is available, closer in time to the actual hearing and decision of the immigration judge, the more readily the respondent and the Service will be able to utilize that transcript. The longer a transcript is delayed, the more the events memorialized in that transcript may fade from the memories of the respondent, respondent's counsel, and the Service's trial attorney. The Department believes that fairness requires that the transcript be made available to all of the parties at the earliest possible time.

The Department also recognizes that the Board has made substantial improvement in this area. For appeals filed in fiscal year 2001, the average time from the filing of the Notice of Appeal to setting the briefing schedule was 158 days. That statistic would appear to reflect the commenters' concerns. However, for fiscal year 2002 through June 2002, the average time was 97 days. The Department is not satisfied with this delay and believes that a 60-day time-frame is possible and should be implemented. If necessary, the Board and the immigration courts should alter their internal operating procedures to ensure that transcripts can be provided within this time-frame.

In response to this concern by the commenters, the Department has added a requirement in § 3.5(a) that the Chairman and the Chief Immigration Judge take such steps as necessary to ensure that transcripts are produced as soon as practical after the filing of the Notice of Appeal. This will also assist the immigration judges in reviewing any oral decision in the transcript. The Chairman and the Chief Immigration Judge are expected to report on progress in this area regularly.

3. Immigration Judge Time Limits To Review Decisions

Some commenters voiced a concern that the 14-day time limit for an immigration judge to review transcripts and any oral decision was unrealistic in high-volume jurisdictions. The Department disagrees. The Department recognizes that there will be some dislocation as the transcription process is accelerated and the immigration judges have a shorter period of time to review a number of transcripts to meet this deadline. However, once these processes are in place, that pressure will dissipate. The Department is confident that the immigration judges will be able to adjust their schedules to accommodate this implementation process.

4. 30-Day Notice of Appeal Filing Requirement

Some commenters felt that the 30-day period within which an appeal must be filed was too short a period within which a party can be expected to articulate reasons for contending that three-member review is warranted. The Department disagrees. The filing time for a Notice of Appeal has not been changed by the proposed or final rule. The existing 30-day period—a substantial increase in the 10-day limit

[12] The proposed rule provided that the immigration judge would have a set time to ''review and approve the transcript.'' This language may have given the impression that an immigration judge may alter a transcript when this authority clearly does not exist. An immigration judge should, of course, review the transcript of proceedings to ensure that it is complete, but there is no authority to ''amend'' the transcript. The immigration judge's oral decision, on the other hand, is subject to a small degree of modification and clarification necessitated by the fact that the decision is orally dictated and does not reflect inflection. An immigration judge may not, however, make substantive changes in the decision.

that formerly applied until recent years—appears to have worked well. As noted above, the parties are already familiar with the issues presented and should, in a short period of time, be able to articulate with some specificity the issues that they wish to raise on appeal. The transcript of hearings is not necessary for this process. The facts should be fresh in the parties' minds and the legal arguments should have been fleshed out before the immigration judge. The Department has found no reason to change this provision of the regulations.

5. Decisional Time Limits

Some commenters also argued that the 90- and 180-day time limits for adjudication were unrealistic and would result in rushed and erroneous decisions. Other commenters, however, supported the new time limits, and a few suggested that a 90-day limit be placed on deciding all detained cases.

The Department is not persuaded that the proposed time frames for deciding a case will hinder the quality of decisions made by either single Board members or three-member panels. The rule provides adequate time for the Board to decide the vast majority of cases before it, and in those rare cases where more time is needed, the rule provides a procedure for extending that time. The Department also believes that 8 CFR 3.1(e)(8) sufficiently directs the Board to assign priority to deciding case appeals involving detained respondents, or bond appeals, which procedure is consistent with existing practice, without the need for separate time limits for those matters.

6. Holding Cases Pending Significant Changes in Law and Precedent

A few commenters noted that proposed § 3.1(e)(8)(iii) permits the Chairman to hold a case or cases pending resolution of issues pending before the United States Supreme Court or the courts of appeals that will substantially affect the outcome of the cases to be held. These comments suggested that the Chairman should also be authorized to hold cases that are directly affected by pending legislation, pending regulatory changes, and pending *en banc* decisions.

The Department agrees with these comments in part, and has expanded 8 CFR 3.1(e)(8)(iii) to cover pending Department regulations and pending *en banc* decisions. Because some issues will arise rapidly and in multiple cases, the Department expects that the Chairman, as a matter of discretion in managing the caseload, will be able to utilize the authority granted under this provision to group cases to determine which record provides the clearest issue for precedent decisions by the Board *en banc.* To facilitate the management of these case and case-group holds with the legislative and regulatory programs of the Department, the Chairman is directed to inform the Director of EOIR and the Attorney General of all such holds.

*I. Decisional Issues*

1. Management of Decisions

Several commenters expressed the view that the regulation granted too much authority to the Attorney General, the Director of EOIR, and the Chairman of the Board to manage the decision-making of individual Board members. Some of these commenters generally challenged the Attorney General's authority over the Board.

These commenters misunderstand the nature of the Board. The Board is the creation of the Attorney General; it is not a statutory body. As discussed above, the Board's authority derives from a delegation of authority from the Attorney General. *See Guentchev* v. *INS, supra; Matter of Hernandez-Casillas, supra,* at 289 n.9. In this rule, the Department alters the process by which the caseload is managed, but does not dictate or determine the ultimate outcome in any case or group of cases. The Department expects the Board Members to continue to exercise independent judgment regarding the interpretation of the law, subject to applicable legal standards and review by the Attorney General, and in conformity with applicable judicial precedents.

2. Remand Motions

One commenter stated that under proposed § 3.1(e)(2), respondents should also be afforded the right to file a motion to remand on any substantive ground. The Department notes that this suggestion is outside the scope of the rulemaking and does not address that suggestion at this time. However, in the future, the Department may consider a more complete revision of the motions practice before the Board. At this time, the Department has changed § 3.1(e)(2) to more closely reflect the authority currently codified in § 3.1(a)(1) for a single Board member to make various procedural dispositions of cases. There is also no provision that bars a contested motion to remand the record; the Board has considered such motions for years.

3. Rehearing *en banc*

One commenter stated that rehearing *en banc* is almost never done, and suggested that revising the Board's rehearing *en banc* authority is effectively meaningless. The Department believes that *en banc* review is a valuable process in the establishment of precedential guidance for immigration judges, and one of the results of decreasing the size of the Board is to increase its ability to provide such guidance in a meaningful way. However, *en banc* proceedings are very resource intensive and should not be readily undertaken. The Department believes that the Board's electronic *en banc* process has been successful and should be continued. Moreover, the Board can and does designate panel decisions as precedent decisions without the need to convene a full *en banc* proceeding by using the electronic *en banc*, and should continue that practice whenever possible. The proposed rule added a sentence in 8 CFR 3.1(a)(5), taken from Federal Rules of Appellate Procedure Rule 35(a), with respect to rehearing *en banc* in the courts of appeals, providing that *en banc* proceedings are disfavored and shall ordinarily be ordered only for questions of exceptional importance or to secure or maintain the uniformity of the Board's decisions. However, to avoid concerns that this language might unintentionally inhibit the Board's use of the *en banc* process, the final rule uses the term ''particular importance'' rather than ''exceptional'' importance. The Department disagrees with the suggestion of some commenters that this provision is effectively meaningless.

4. Separate Opinions

One commenter suggested that the Department eliminate dissenting and concurring opinions for precedent decisions. This rule does not take a position on that suggestion. Dissenting and concurring opinions can serve a valuable purpose, within limits, in precedential decisions. Not all precedent decisions can resolve all aspects of an issue presented and there may be valuable disagreements that warrant further briefing in subsequent cases. The Department does not wish to limit the conversation that must occur to develop lines of precedent so long as the concurring and dissenting opinions are efficiently prepared.

On the other hand, there is substantial reason to question the number of lengthy written dissents in unpublished, non-precedential decisions. Although the percentage of separate opinions may be relatively low, there is a serious question of the merits of committing substantial time and effort to writing separate opinions in a non-precedential case. Accordingly, while the

Department recognizes that Board members may wish to file such opinions, the Department also believes that it is appropriate that such opinions not adversely affect the time and resources of the Board.

5. Changes in the Notice of Appeal

Several commenters recognized that the Notice of Appeal forms must be modified to conform with the changes under the new rule. The Department agrees, and has made changes to Form EOIR–26 and Form EOIR–29 to incorporate the final rule.

Form EOIR–26 has generally been revised to include the new basis for summary dismissal and requires the respondent to identify the legal and factual bases for appeal when requesting review by a three-member panel. Form EOIR–29 also provides that a party appealing a decision of a Service officer (therein referred to as an ''INS officer'' for ease of understanding by the applicants) must file an appeal within 30 days of receiving the decision. The Department expects that these forms will be used upon the effective date of this regulation. We have attempted to make the requirements of the Notice of Appeal as clear as possible, taking into account the concerns expressed in cases such as *Vargas-Garcia* v. *INS,* 287 F.3d 882 (9th Cir. 2002).

6. Barring Oral Argument Before a Single Board Member

One commenter stated that eliminating oral argument in cases assigned to a single Board member for decision is a further erosion of a respondent's due process rights. Section 3.1(e)(7) reflects the current authority of the Board to grant or deny requests for oral argument, but it also makes clear that no oral argument will be available in any case assigned to a single Board Member for disposition. The Department disagrees that this provision is a further erosion of a respondent's due process rights, initially because there is no due process right to an oral argument before the Board. Moreover, oral argument is rarely granted even in cases that are heard by a three-member panel, and the Department believes that it is entirely appropriate to establish a general rule barring oral argument in a case that does not even meet any of the factors meriting review by a three-member panel under § 3.1(e)(6) of this rule.

7. Location of Oral Argument

One commenter noted that the Board has held oral argument in other cities, sometimes without regard to whether the cases being argued were from those localities, thus imposing burdens on the parties and the Board. Accordingly, the commenter suggested limiting the location of oral argument to EOIR's headquarters. The Department agrees that it is generally unwarranted for the Board to hold oral argument other than in its own oral argument room, unless such other location is more convenient to the Board and the parties. Accordingly, the final rule directs the Chairman to hold oral argument at the EOIR's headquarters unless the Deputy Attorney General or his delegate specifically provides otherwise.

8. Summary Dismissal of Frivolous Appeals and Discipline

The final rule in § 3.1(d)(2)(i)(D) gives the Board the authority to summarily dismiss an appeal that the Board finds has been filed for an improper purpose, such as to cause unnecessary delay, or that lacks an arguable basis in fact or law, unless the appeal is supported by a good faith argument for extension, modification, or reversal of existing law. Attorneys who file appeals that are summarily dismissed under § 3.1(d)(2)(i)(D) may be subject to a finding that they have engaged in frivolous behavior as defined in § 3.102(j).

Several commenters expressed the view that giving the Board the authority to dismiss an appeal because it has been deemed frivolous under the standards of paragraph (D) will have a chilling effect on attorneys, so as to reduce the number of attorneys who will file appeals before the Board. These commenters believe that, if disciplinary measures are strictly enforced, attorneys will be deterred from filing an appeal on behalf of indigent respondents. Several commenters stated that the necessity of § 3.1(d)(2)(i)(D) has not been sufficiently explained and that this section is unnecessary since regulations already exist to impose disciplinary measures on attorneys. These commenters maintained that the line between an appeal that has been deemed frivolous and a bona fide legal argument is hard to distinguish. Therefore, they argue, it will be difficult for the Board to appropriately determine what actually constitutes an appeal that should be dismissed under this section.

Several commenters expressed the view that this section will also deter attorneys from presenting arguments on appeal because the Board may deem them as frivolous. A few commenters maintained that the definition of ''frivolous'' that will be used by the Board in its determination should be consistent with the definition provided in prevailing law, common law, the Federal Rules of Civil Procedure, and the Canons of Professional Responsibility. Another comment contended that the definition of frivolous may change based on the state of immigration law.

The Department has decided to retain the regulation as proposed. The primary concern stated in all of these comments is the effect this ground will have on the types and number of appeals filed. The Attorney General has the authority to instruct the Board to set criteria for which appeals may be dismissed. An appeal that is filed for an improper purpose is chief among those appeals that the Board should not be forced to review. The Department concludes that these appeals should be dismissed in order to give Board members more time to adjudicate meritorious appeals.

The Board previously had the authority to dismiss frivolous appeals. *See* 47 FR 16771, 16772 (April 20, 1982) (giving the Board authority to summarily dismiss a frivolous appeal); 8 CFR 3.1(d)(1–a)(iv) (1982). The Board has also dismissed frivolous appeals. *See, e.g., Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972). There is no showing that, when these provisions were in effect, attorneys were deterred from filing appeals, or that the Board was actively dismissing appeals that truly had merit.

The prior experience of the Board in dismissing frivolous appeals also serves to address the concern that there is no appropriate definition for what constitutes a frivolous appeal. The Board can rely on earlier precedent decisions to make such a finding. *See e.g., Matter of Gamboa, supra; Matter of L–O–G–,* 21 I&N Dec. 413 (BIA 1996); *Matter of R–P–*, 20 I&N Dec. 230 (BIA 1990); *Matter of Patel*, 19 I&N Dec. 394 (BIA 1986). Along with this case law, the Board can draw from the definition for frivolous behavior in 8 CFR 3.102(j) to determine what constitutes a frivolous appeal. The Department also expects the Board to be guided by other interpretations of what amounts to ''frivolous'' in implementing the rule, including the decisions of the United States courts under F. R. Civ. P. 11 and the American Bar Association's Standards of Professional Conduct. An attorney is clearly on notice as to the definition of frivolous behavior.

The commenters also stated that this section is unnecessary because regulations already exist to impose disciplinary measures on attorneys. The Department disagrees and will retain the rule as proposed. Section 3.1(d)(2)(iii) provides that filing an appeal that is summarily dismissed as frivolous may constitute grounds for disciplining an

attorney or representative under 8 CFR 3.102. The purpose of this provision is to invoke the disciplinary process, that is, to give the EOIR Office of the General Counsel an opportunity to consider whether a complaint should be filed under the existing disciplinary process. EOIR's General Counsel may commence the disciplinary process based on a referral by anyone. The process of a referral for review by EOIR's General Counsel, and the possibility of a hearing and determination, may be invoked if the Board member or panel believes such an inquiry is justified. Accordingly, the Department believes that there is no ''chilling'' effect from the promulgation of this rule.

9. Mandatory Summary Dismissals

Some commenters suggested that it was inappropriate to change the authority to summarily dismiss appeals from discretionary to mandatory, because respondents may not understand the requirements and the Board members should retain discretion.

The Department has considered the views of the commenters, as well as judicial decisions such as *Vargas-Garcia* v. *INS,* 287 F.3d 882 (9th Cir. 2002), which have challenged summary dismissals by the Board. The Department has decided not to make this proposed change at the present time, but to defer consideration of these issues for possible action in the future. In the meantime, the Department notes that the grounds for summary dismissal in § 3.1(d)(2)(i), including the restored ground relating to frivolous appeals, will remain available for the Board to utilize, in all appropriate cases, in the exercise of discretion by the Board member or panel to which an appeal is assigned.

The rules have provided for years that an appeal may be dismissed if the appealing party ''fails to specify the reasons for the appeal on [the Notice of Appeal] or other document filed therewith.'' 8 CFR 3.1(d)(2)(i)(A). *See Toquero* v. *INS*, 956 F.2d 193 (9th Cir. 1992); *Alleyne* v. *INS*, 879 F.2d 1177 (3rd Cir. 1989); *Athehortua-Vanegas* v. *INS,* 876 F.2d 238 (1st Cir. 1989); *Bonne-Annee* v. *INS,* 810 F.2d 1077 (11th Cir. 1987); *Townsend* v. *United States Department of Justice*, *INS,* 799 F.2d 179 (5th Cir. 1986); *Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986). The Department expects the Board to continue to utilize this authority in appropriate cases and reiterates the view that these requirements are fundamentally sound and in conformity with due process.

10. Finality of Decisions and Remands

The final rule also reinserts former 8 CFR 3.1(d)(3) (2000), without change, dealing with finality of decisions and remands, as new § 3.1(d)(6). That provision had been part of the Board's regulations for many years but was inadvertently overwritten when unrelated changes in the regulations were made in 2000. Under the circumstances, the Department has determined that this preexisting provision may be reinserted in the Board's regulations without notice and comment under the Administrative Procedure Act.

In 1999, as part of the streamlining rule, the Department amended 8 CFR 3.1(d) to redesignate its paragraphs for clarity. 64 FR 56135 (Oct. 18, 1999). The streamlining rule redesignated former paragraphs (d)(1–a), (d)(2), and (d)(3) as new paragraphs (d)(2), (d)(3), and (d)(4), respectively. 64 FR at 56141. After the redesignation in 1999, paragraph (d)(2) on finality of decisions and remands was codified as § 3.1(d)(3) (2000).

However, this change was unintentionally disrupted by the subsequent final disciplinary rule in 2000. 65 FR 39513 (June 27, 2000). The preamble and the regulatory text make clear the intent to update the specific regulatory citations of the summary dismissal grounds to reflect the new codification of the disciplinary grounds, and to revise the paragraph dealing with rules of practice and discipline, § 3.1(d)(4) (2000). However, that final disciplinary rule incorrectly instructed the **Federal Register** to codify the revised paragraph dealing with rules of practice as paragraph (d)(3). The result of this error was effectively to overwrite the language of the preexisting paragraph (d)(3) on finality of decisions and remands, and to leave instead two different versions of the rules of practice provision in paragraphs (d)(3) and (d)(4).

Operationally, the Board's practice has not changed despite this error in codification. Given the clearly unintended result of the erroneous 2000 regulatory instructions, the Department is reinserting the overwritten language without change, as a new paragraph (d)(6).

*J. Applicability of Procedural Reforms to Pending Cases*

Many commenters raised concerns that the proposed rule would impose procedural obligations that would be impossible to meet for pending cases and would otherwise violate due process. The Department notes, however, that changes in procedural rules typically are made applicable to all cases pending as of the date the new procedural rules are promulgated. *See, e.g.*, Order, 383 U.S. 1031 (1966) (transmitting amendments to the Federal Rules of Civil Procedure; including amendments to Fed. R. Civ. P. 12, 13, 19, 23); *Landgraf* v. *USI Film Products*, 511 U.S. 244, 275 n.29 (1994). The Department has determined that the final rule will apply to all pending cases, with one exception. *See Smiley* v. *Citibank (South Dakota)*, N.A., 517 U.S. 735, 739–40 (1996); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States* v. *Morton*, 467 U.S. 822, 835–36 n.21 (1984); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Some commenters were of the opinion that all the pending cases, ''approximately 40,000,'' would have to be re-briefed in a short time, affecting the quality of representation. A few commenters argued that re-briefing all the pending cases would have a significant impact on small entities and therefore implicate the Small Business Regulatory Enforcement Fairness Act of 1996 and the Unfunded Mandates Reform Act of 1995.

After careful consideration of the public comments suggesting the need for an opportunity for those individuals with pending appeals at the Board to respond to the new screening criteria, the Department has adopted, in part, an approach suggested by some of the commenters. The final rule contains a notice provision at § 3.3(f) providing that a party who has an appeal pending at the Board on August 26, 2002, may file a supplemental brief or statement on why the appeal meets the criteria for three-member review under § 3.1(e)(6) of the final rule on or before September 25, 2002, or the due date for the party's brief, whichever is later. Following the effective date, the Board will apply the final rule to all appeals, with consideration given to any additional brief or statement filed in accordance with this provision. The filing of any such additional brief or statement, however, is entirely optional in all of the pending cases. The Board, in its discretion, will determine how these briefs will be considered and what procedure will be used in determining whether to apply a single-member or three-member panel review.

The Department disagrees with the notion that these cases cannot be reviewed under the standards specified in the rule for single-member and three-member panel review. Appellants do not have any vested right or entitlement to review by a three-member panel of the Board, or even an expectation that their case is more likely than not to be

referred to a three-member panel. At present, all pending cases are subject to review under the existing streamlining process under § 3.1(a)(7) of the existing rules, and this new rule would retain that streamlining process under § 3.1(e)(4). Even in FY 2001, long before the publication of the proposed rule to reform the Board's procedural rules, the Board already was resolving a clear majority of pending appeals by summary affirmance without opinion, issued by a single Board member, after determining that those cases meet the standards of the existing streamlining process. Under the new rule, all cases will be reviewed on the merits to determine if there are any factual or legal errors or other circumstances that meet the criteria for three-member review. The opportunity for those with pending cases to assert that an appeal warrants three-member review is not intended as a substitute for Board screening; rather, it is an additional opportunity to facilitate the screening process. The burden of administering this provision is quite limited. A party is not required to make any filing, but may do so. Regardless of whether a party files an optional brief or statement under § 3.3(f) regarding a pending appeal, every case will still be reviewed under the standards of this rule to determine whether or not the case meets the standards of § 3.1(e)(6).

The Department also disagrees with the notion that the application of the case management system to pending appeals at the Board will have a significant impact on small entities and implicate the Unfunded Mandates Reform Act. In approximately one third of cases filed with the Board, the respondent is not represented. In a small percentage of cases, the Service has appealed. In those cases where the respondent has appealed through counsel or an accredited representative, it behooves the attorney or representative to review the case file to determine whether these standards warrant an additional filing. However, this does not mean, and the Department does not expect, that a large number of cases will warrant such an additional filing. This is not an open invitation to file a brief where a respondent has previously indicated that he or she would file a brief in the Notice of Appeal and has not done so. These cases may be subject to summary dismissal under existing standards or under the final rule. All cases are currently subject to the streamlining review and this rule does not appreciably change that review in any case where summary affirmance would be appropriate. Accordingly, while some individual attorneys or representatives may find a few cases that objectively warrant an additional filing, the Department does not expect the impact to be significant.

Some commenters suggested that *Landgraf* v. *USI Film Products* bars the application of the revised standard of review in § 3.1(d)(3) to pending cases. The Department believes that these rules are generally administrative and procedural in nature and do not implicate the retroactivity concerns expressed in *INS* v. *St. Cyr*, 533 U.S. 289 (2001); *Lindh* v. *Murphy*, 521 U.S. 320, 327–28 (1997); and *Landgraf* v. *USI Film Products, supra.*

The commenters' concerns seem to relate particularly to whether the clearly erroneous standard for review of an immigration judge's factual findings under § 3.1(d)(3)(i) would prejudice an individual respondent. Section 3.1(d)(3)(i) of the rule establishes the scope of review for factual determinations of the immigration judge. However, the change in the standard would have no effect on any appeal where the decision is based on a question of law or the exercise of discretion based on established facts, or any appeal where a disputed fact is not material to the decision. The provision does not have any bearing on motions before the Board or appeals from decisions by Service officers. Thus, the Department believes that the number of such cases would be very small.

In order for the application of the clearly erroneous standard to be prejudicial to the respondent in a pending case, the case must turn on an error of fact made by the immigration judge—a factual finding that is erroneous, but not clearly erroneous—and that is also material to the basis for the decision of the immigration judge and the Board.

Even so, the Department recognizes that an application of the clearly erroneous standard to all pending cases would require the Board to review each case, on an individualized basis, to determine if such circumstances may be present. Rather than having the Board take the time to make these additional determinations in such pending appeals, the Department has determined that it would be more efficacious simply to continue the current scope of review standards for pending cases, and to apply the clearly erroneous standard only to the review of immigration judge decisions in those appeals filed on or after the effective date. Accordingly, § 3.3(f) of the final rule provides that § 3.1(d)(3)(i) will not apply with respect to pending cases filed with the Board prior to September 25, 2002.

The Department notes that § 3.1(d)(3)(iv), which prohibits additional factfinding by the Board on appeal, will apply to all cases pending as of the effective date of this rule. There can be no prejudice in the application of this rule to pending cases, because the rule provides for a remand for further factfinding in any case where the Board determines that additional factfinding is required in a particular case.

*K. Transition Period and Reduction of the Backlog*

A number of commenters suggested that the period of time imposed within the proposed rule for the Board to meet the backlog reduction requirements was far too short. They argued that the sheer numbers of cases to be decided within that six-month period would reduce the amount of time available for each case, with some commenters offering calculations that this would be reduced to approximately 15 minutes.

The Department disagrees with these comments and has not altered the time frame for eliminating the backlog of pending cases. Pure mathematical formulas in this area have the beauty of simplicity, but are deceptive. Calculating an average amount of time for a single Board member to decide one case overlooks the differences in cases themselves and the preparatory work that goes into decisions. For example, the Department expects that a clearly untimely appeal can be dispatched promptly by a Board member under the streamlining process. For each such simple case (and the Board's experience streamlining has shown there are many), more time is afforded for considering the issues to which the Board's time should be devoted.

Moreover, the six-month time frame runs from the effective date of the rule, not the date on which it is published in the **Federal Register**. To say that the Board has not been on notice of this rule also disserves the Board. The Board has been diligently preparing for the implementation of this rule to reduce its backlog of pending cases since the Notice of Proposed Rulemaking was published on February 19, 2002. The Board has increased its disposition rate dramatically. In 2000, the first full year in which the Board utilized streamlining, the Board averaged 1800 dispositions per month. With the expanded use of streamlining, dispositions increased to an average of 2600 per month in 2001. In February, 2002, when the proposed rule was published, the Board decided 3300

cases. In recent months, utilizing its authority under streamlining, the Board has increased dispositions to an average of over 5200 dispositions per month. With the additional authority granted by this final rule, the Department believes that it is reasonable to expect the Board to bring the caseload backlog down to, or near, a current balance within the six-month transition period. The Department is aware, of course, that specific factors, such as the requirement that the Board improve on providing transcripts to the parties in a timely manner, may adversely impact the disposition rate against the number of cases available for disposition by accelerating the number of records that are available for disposition. The Department is convinced that the transition period is sufficient for the Board to reduce the backlog. Accordingly, the Department is unconvinced that this implementation period should be altered.

*L. Administrative Fines Cases*

The Department has decided to address the transfer of administrative fines cases to the Office of the Chief Hearing Examiner (OCAHO) in a separate final rule because of a technical legal issue unrelated to the proposed rule and the comments received on the proposed rule. The Department plans to publish this separate final rule in the near future.

*M. Miscellaneous and Technical Issues*

1. The Board's Pro Bono Project

Several commenters stated that the Department should not take any administrative actions that would disrupt the success of the Board's Pro Bono Project. Although these comments fall outside the scope of the proposed and final rule, the Department wishes to take this opportunity to assure the bench, bar, and public of its commitment to this process. On January 17, 2001, EOIR announced a Pro Bono Project that links volunteer representatives from around the country with detained immigrants who lack legal representation. The Department fully supports this partnership between the government and nonprofit organizations. The Department recognizes the value of representation for respondents in the removal process. Although respondents generally are able to present their points of view ably, often with the assistance of language translators, the availability of attorneys and representatives learned in the technical aspects of immigration law is useful both to guide the respondent and to conserve judicial resources of the immigration judges and the Board.

2. Fundamental Changes in Structure

Other commenters have suggested substantial changes in the underlying structure of the administrative immigration adjudication system. For example, some suggested that respondents should be charged filing and transcript fees more commensurate with the actual costs of the proceedings. Another comment, as well as a proposal by a former Member of the House Judiciary Committee, was that the Department abolish automatic appeals (either generally or of denial of asylum by Service asylum officers) or that only a discretionary appeal to the Board be allowed. The Department believes that these proposals fall outside the scope of the present rule and will not consider such proposals at this time.

3. Technical Amendments

The Department has changed the regulation in § 3.1(a)(4) to permit administrative law judges (ALJs) retired from EOIR to serve as temporary Board members. Under the existing regulations, ALJs from OCAHO may participate in Board decisions as temporary members. Accordingly, the Department has determined that this technical change should be made in the final rule.

Section 3.1(e), dealing with the case management system, begins by instructing the Chairman to establish a case management system to screen all ''appeals.'' The current streamlining process screens, and the proposed rule was designed to provide screening of, all cases filed with the Board, including motions as well as appeals. Accordingly, the term has been changed to reflect the existing practice and the intent behind the proposed rule.

The Department has changed the rule in § 3.1(e)(8) to eliminate the words ''denials of review as a matter of discretion'' because it has been suggested that these words imply that the Board has authority to deny review as a matter of discretion. This was not the Department's intent. To eliminate this concern, the text has been changed.

The proposed rule in § 3.1(e)(8)(ii) provides the Chairman with the authority, in exigent circumstances, to issue a decision where a panel is unable to meet the time limits. The Department has amended the rule to permit the Chairman the authority to delegate such decisions to a Vice-Chairman.

**Regulatory Flexibility Act**

The Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it affects only Departmental employees, aliens, or their representatives who appear in proceedings before the Board of Immigration Appeals, and carriers who appeal decisions of Immigration and Naturalization Service (INS) officers. Therefore, this rule does not have a significant economic impact on a substantial number of small entities.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**Executive Order 12866**

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

**Executive Order 13132**

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant a federalism summary impact statement.

**Executive Order 12988**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

**Paperwork Reduction Act of 1995**

The Executive Office of Immigration Review has submitted the following information collection requests to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collections are published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments on the estimated public burden or associated response time, suggestions, or need a copy of one of the proposed information collection instruments with instructions or additional information, please contact the Executive Office for Immigration Review as noted above. Written comments and suggestions from the public and affected agencies concerning the proposed collections of information are encouraged. Your comments should address one or more of the following four points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

The first information collection, titled Notice of Appeal from a Decision of an Immigration Judge, is a revision of a currently approved collection. The agency form number is EOIR–26. The information collected will be sponsored by the Executive Office for Immigration Review for parties affected by a decision of an Immigration Judge who may appeal to the Board of Immigration Appeals, provided the Board has jurisdiction pursuant to 8 CFR 3.1(b). An appeal from an Immigration Judge's decision is taken by completing the form and submitting it to the Board. The collection will be distributed primarily to the Federal Government. It is estimated that 23,417 complainants will report one complaint, taking an average of 30 minutes to complete. This will result in 23,417 responses with an estimated total of 11,707 annual burden hours. This is a reduction of 1,791.5 in burden hours due to a decrease in the number of appeals filed with the Board since this form was last approved in 1999.

The second information collection, titled Notice of Appeal to the Board of Immigration Appeals from a Decision of a Service Officer, is a revision of a currently approved collection, occasioned by changes in the regulations. The agency form number is EOIR–29. The information collected will be sponsored by the Executive Office for Immigration Review for a party affected by a decision of a Service Officer who may appeal that decision to the Board of Immigration Appeals, provided the board has jurisdiction pursuant to 8 CFR 3.1(b). An appeal from a Service Officer's decision is taken by completing the form EOIR–29. It is then submitted to the Service office having administrative control over the record of proceedings. The collection will be distributed primarily to individuals and households. It is estimated that 3,156 complainants will report one complaint, taking an average of 30 minutes to complete. This will result in 3,156 responses with an estimated total of 1,578 annual burden hours, which is the same as currently required.

**Plain Language Instructions**

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

**List of Subjects in 8 CFR Part 3**

Aliens, Immigration.

Accordingly, for the reasons set forth in the preamble, part 3 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

## PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for 8 CFR part 3 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386; 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Amend § 3.1 by:

a. Revising the heading;

b. Revising paragraphs (a)(1) through (a)(6) and paragraph (b) introductory text;

c. Revising paragraphs (d)(1), (d)(2)(i) introductory text, (d)(2)(ii), (d)(2)(iii), and (d)(3);

d. Redesignating paragraphs (d)(2)(i)(D) through (G) as paragraphs (d)(2)(i)(E) through (H), respectively, and adding a new paragraph (d)(2)(i)(D);

e. Revising paragraph (d)(4) and adding paragraphs (d)(5) and (d)(6); and

f. Revising paragraphs (e) and (g), to read as follows:

**§ 3.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.**

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. Within six months of the implementation of the case management screening system as provided in paragraph (e) of this section, or such other time as may be specified by the Attorney General, the Board shall be reduced to eleven members as designated by the Attorney General. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

(2) *Chairman.* The Attorney General shall designate one of the Board members to serve as Chairman. The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases, and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.

(3) *Panels.* The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) *Temporary Board members.* The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary, additional Board members for terms not to exceed six months. A temporary Board member assigned to a case may continue to participate in the case to its normal conclusion, but shall have no role in the actions of the Board *en banc.*

(5) *En banc process.* A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board *en banc.* The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case *en banc,* or reconsider as the Board *en banc* any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

(6) *Board staff.* There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

* * * * *

(b) *Appellate jurisdiction.* Appeals may be filed with the Board of Immigration Appeals from the following:

(d) *Powers of the Board*—(1) *Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals*—(i) *Standards.* A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

* * * * *

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

* * * * *

(ii) *Action by the Board.* The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 3.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review.* (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo.*

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo.*

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

(4) *Rules of practice.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of attorneys and representatives.* The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 292.2 of this chapter. It shall also determine whether any organization desiring representation is of a kind described in

§ 1.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any immigration judge.

(6) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a Service motion to remand any appeal from the decision of a Service officer where the Service requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: ''The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4).'' An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) *Other decisions on the merits by single Board member.* If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) *Panel decisions.* Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 3.1(e)(5).

(7) *Oral argument.* When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board *en banc* may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or his designee authorizes oral argument to be held elsewhere. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel

is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice-Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending *en banc* Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) For any case ready for adjudication as of September 25, 2002, and that has not been completed within the established time lines, the Chairman may, as a matter of discretion, grant an extension of up to 120 days.

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

(vi) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.

* * * * *

(g) *Decisions of the Board as precedents.* Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or immigration judges in the administration of the Act. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.

* * * * *

3. In § 3.2, paragraph (i) is amended by adding after the first sentence a new sentence, to read as follows:

**§ 3.2 Reopening or reconsideration before the Board of Immigration Appeals.**

* * * * *

(i) * * * Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 3.1(e)(6). * * *

* * * * *

4. In § 3.3, paragraphs (a) and (c) are revised, paragraph (b) is amended by adding a new sentence at the end thereof, and paragraph (f) is added, to read as follows:

**§ 3.3 Notice of appeal.**

(a) *Filing*—(1) *Appeal from decision of an immigration judge.* A party affected by a decision of an immigration judge which may be appealed to the Board under this chapter shall be given notice of the opportunity for filing an appeal. An appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR–26) directly with the Board, within the time specified in § 3.38. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of service of a copy of the appeal and all attachments on the opposing party. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified in the governing sections of this chapter. A Notice of Appeal may not be filed by any party who has waived appeal pursuant to § 3.39.

(2) *Appeal from decision of a Service officer.* A party affected by a decision of a Service officer that may be appealed to the Board under this chapter shall be given notice of the opportunity to file an appeal. An appeal from a decision of a Service officer shall be taken by filing a Notice of Appeal to the Board of Immigration Appeals from a Decision of an INS Officer (Form EOIR–29) directly with the office of the Service having administrative control over the record of proceeding within 30 days of the service of the decision being appealed. An appeal is not properly filed until it is received at the appropriate office of the Service, together with all required documents, and the fee provisions of § 3.8 are satisfied.

(3) *General requirements for all appeals.* The appeal must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 3.8. If the respondent or applicant is represented, a Notice of Entry of Appearance as Attorney or Representative Before the Board (Form EOIR–27) must be filed with the Notice of Appeal. The appeal and all attachments must be in English or accompanied by a certified English translation.

(b) * * * An appellant who asserts that the appeal may warrant review by a three-member panel under the standards of § 3.1(e)(6) may identify in the Notice of Appeal the specific factual or legal basis for that contention.

* * * * *

(c) *Briefs*—(1) *Appeal from decision of an immigration judge.* Briefs in support of or in opposition to an appeal from a decision of an immigration judge shall be filed directly with the Board. In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available. In cases involving aliens in custody, the parties shall be provided 21 days in which to file simultaneous briefs unless a shorter period is specified by the Board, and reply briefs shall be permitted only by leave of the Board. In cases involving aliens who are not in custody, the appellant shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Board. The appellee shall have the same period of time in which to file a reply brief that was initially granted to the appellant to file his or her brief. The time to file a reply brief commences from the date upon which the appellant's brief was due, as originally set or extended by the Board. The Board, upon written motion, may extend the period for filing a brief or a reply brief for up to 90 days for good cause shown. In its discretion, the Board may consider a brief that has been filed out of time. All briefs, filings, and motions filed in conjunction with an appeal shall include proof of service on the opposing party.

(2) *Appeal from decision of a Service officer.* Briefs in support of or in opposition to an appeal from a decision of a Service officer shall be filed directly with the office of the Service having administrative control over the file. The alien and the Service shall be provided 21 days in which to file a brief, unless a shorter period is specified by the Service officer from whose decision the

appeal is taken, and reply briefs shall be permitted only by leave of the Board. Upon written request of the alien, the Service officer from whose decision the appeal is taken or the Board may extend the period for filing a brief for good cause shown. The Board may authorize the filing of briefs directly with the Board. In its discretion, the Board may consider a brief that has been filed out of time. All briefs and other documents filed in conjunction with an appeal, unless filed by an alien directly with a Service office, shall include proof of service on the opposing party.

* * * * *

(f) *Application on effective date.* All cases and motions pending on September 25, 2002, shall be adjudicated according to the rules in effect on or after that date, except that § 3.1(d)(3)(i) shall not apply to appeals filed before September 25, 2002. A party to an appeal or motion pending on August 26, 2002, may, until September 25, 2002, or the expiration of any briefing schedule set by the Board, whichever is later, submit a brief or statement limited to explaining why the appeal or motion does or does not meet the criteria for three-member review under § 3.1(e)(6).

* * * * *

5. In § 3.5, paragraph (a) is revised to read as follows:

**§ 3.5 Forwarding of record on appeal.**

(a) *Appeal from decision of an immigration judge.* If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location. The Chairman and the Chief Immigration Judge shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges, and take such steps as necessary to reduce the time required to produce transcripts of those proceedings and improve their quality.

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Dated: August 19, 2002.

**John Ashcroft,**

*Attorney General.*

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